Criminal Law

THE YEAR AND A DAY RULE IN HOMICIDE

A Consultation Paper

LAW COMMISSION
CONSULTATION PAPER No 136

CONSULTATION

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This Consultation Paper, completed for publication on 23 May 1994, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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The Law Commission

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THE YEAR AND A DAY RULE IN HOMICIDE

PART I

INTRODUCTION

1.1 In this Consultation Paper, this Commission reviews the long-established common law rule that a person cannot be convicted of murder where death does not result within a year and a day after the injury that caused the death.[1] The rule also applies to manslaughter,[2] infanticide[3] and probably to the motoring offences of causing death by dangerous driving, causing death by careless driving when under the influence of drink, and aggravated vehicle taking causing death.[4]

1.2 The basis of the rule is to be found in the procedure of the ancient appeal of felony. By the mid-16th century the position according to Staunford[5] was that "it is requisite to homicide, if one strikes another so that he die, that this death should be within a year and a day".

1.3 The rule subsequently changed to the effect that an irrebuttable presumption arose which curtailed the right of the prosecution to prove that the defendant had caused death in these circumstances. In other words, if death occurred after the year and a day period had elapsed, an essential ingredient of homicide was not present. The rule is a legacy of a time when medical science was so rudimentary that if there was a substantial lapse of time between injury and death, it was unsafe to pronounce on the question whether the defendant's conduct or some other event had caused the death. As we will show,[6] the rule has been extended to every well established offence in which causing death is an ingredient, and probably also to recently created statutory offences of similar effect. In this Paper we will consider whether medical science has now progressed to a point when the rule is no longer necessary both because it is now possible to determine whether the defendant's conduct had caused the death and because doctors are able to keep very seriously injured patients alive for long periods.[7]

[1] This will hereafter be called "the rule".

[2] *R v Dyson* [1908] 2 KB 454: see para 2.8 below.

[3] *Per* Bingham LJ and Hutchison J in *R v Inner West London Coroner ex parte De Luca* [1989] QB 249, 252E and 254H: see para 2.10 and Appendix A below.

[4] See para 2.14 and Appendix A below.

[5] Les Plees del Coron (1557), f.21v - translation from DEC Yale "A Year and a Day in Homicide" [1989] CLJ 202, 203.

[6] See Part II below, especially paras 2.8, 2.10, 2.11 and 2.14.

[7] See paras 4.19-4.23 below.

1.4 The law of murder has been subject to critical scrutiny by the Criminal Law Revision Committee ("the CLRC"),[8] and also by the House of Lords Select Committee on Murder and Life Imprisonment ("the Nathan Committee").[9] These bodies dealt with the rule in different ways.

1.5 The CLRC considered the rule and recommended its preservation.[10] It accepted that with the advance of medical science it was no longer necessary to retain the rule for that particular reason, but it felt that the rule was justified because it was wrong for a person to remain almost indefinitely at risk of prosecution for murder, that a line had to be drawn somewhere, and that the year and a day rule provided a suitable time-period. It also took the view that when death follows over a year and day after the infliction of the injury the killer does not necessarily escape justice. He might be charged with attempted murder or causing grievous bodily harm with intent. Later in this Paper we will consider how the law at present treats people who cause death when their victims die more than a year and a day after the relevant act.[11]

1.6 The rule was also considered by the Nathan Committee,[12] which received evidence from a number of witnesses. The Crown Prosecution Service,[13] and the Law Commission,[14] expressed the view that the rule no longer served any useful purpose and that it should be abolished; whereas other bodies, such as the Association of Chief Police Officers of England and Wales[15] and the Howard League for Penal Reform[16] recommended its retention. Witnesses from Scotland gave evidence that the rule did not apply there.[17] The Nathan Committee concluded[18] that it would not be appropriate to recommend the abolition of the rule for the law of murder while it was left in force in relation to offences such as manslaughter and the aiding, abetting, counselling or procuring of suicide[19] which were outside that Committee's terms of reference.

[8] CLRC Fourteenth Report: Offences against the Person (1980) Cmnd 7844 (hereafter referred to as "CLRC 14th Report"): see paras 3.2-3.4 below.

[9] (1989) HL 78-I: see paras 3.6-3.14 below.

[10] CLRC 14th Report para 39: see para 3.3 below.

[11] See paras 4.24-4.45 below.

[12] See para 1.4 above.

[13] See para 3.7 below.

[14] See para 3.8 below.

[15] See para 3.9 below.

[16] See para 3.10 below.

[17] See paras 3.11-3.12 below.

[18] Report of the Select Committee on Murder and Life Imprisonment (1989) HL 78-I para 34: see para 3.13 below.

[19] See Appendix A.

1.7 In recent years there has been increasing public concern about the rule, and in particular about the fact that it has led to some very strange results. Thus on 14th August 1988 the death occurred of Miss Pamela Banyard[20] who had been the victim 18 months earlier of a savage and brutal attack. A pathologist gave evidence to the effect that she had suffered irreversible brain damage in the attack and that for the rest of her life she had remained in a coma under medical care. Her assailant could not be convicted for murder because of the year and day rule. He was convicted of attempted murder and robbery instead and sent to prison for ten years.[21]

1.8 A more recent case involved Michael Gibson[22] who suffered brain damage as a result of an attack on him. He was revived after his heart had stopped and went on living in a persistent vegetative state for 16 months until he died of pneumonia. His assailant was convicted of causing grievous bodily harm and sentenced to two years' imprisonment. This led to widespread public criticism and comment, and to proposed amendments, which were narrowly rejected, to the Criminal Justice and Public Order Bill to abolish the rule in so far as it applied to murder and manslaughter.[23]

1.9 The present position is that academic writers, the Crown Prosecution Service and foreign law reform bodies are and remain critical of the rule.[24] It is also noteworthy that the rule has been abandoned in all but one state in Australia and also in a number of American states[25] and that in both the cases reported this century in which the rule has been considered, the courts have been very conscious of its anomalous nature.[26]

1.10 We believe that the present review of the rule is desirable for three main reasons. In the first place, it is unlikely that the courts will have an opportunity to review the rule, because it has the effect of preventing prosecutions being instituted.[27] If this

[20] Hereafter this case will be referred to as "the Cambridge case".

[21] *Cambridge Evening News*, 16 August 1988 p 5 and 20 August 1988 p 5. See also the reference to this case in DEC Yale, "A Year and a Day in Homicide" [1989] CLJ 202, 202.

[22] *The Independent* 23 October 1993 p 6 and *The Guardian* 1 September 1993. This case received extensive press coverage and led to repeated calls for a change in the law: see further para 4.3 below. Hereafter this case will be referred to as "the Darlington case".

[23] See paras 3.15-3.17 below.

[24] See para 3.18 below and the other passages referred to there.

[25] See para 3.18 below and Appendix B.

[26] See para 2.16 below and the authorities referred to there.

[27] See *R v Commissioner of Police of the Metropolis ex parte Blackburn* [1968] 2 QB 118 when the Court of Appeal held that while the Commissioner owed a duty to the public to enforce the law, he had a discretion not to prosecute in individual cases. It was only in exceptional circumstances that a decision not to prosecute could be challenged, for example, in cases where the prosecuting authorities had adhered to a fixed policy not to prosecute.

Commission does not carry out a review, it is unlikely that the courts will have the opportunity of doing so.[28]

1.11 In the second place, both the Nathan Committee and the Divisional Court[29] have taken the view that they were not prepared to contemplate the rule being abolished for one offence and yet left it in force for others.[30] We were very conscious of the same consideration when we were preparing our consultation paper on Involuntary Manslaughter.[31] The only way in which the rule can be given comprehensive consideration is if it is subjected to critical scrutiny as a discrete subject in its own right.

1.12 The third reason why we believe that this review should be carried out is that the problems to which the existence of the rule gives rise are becoming more evident now because of the increasing use of life support machines to keep people alive for more than a year and a day after a life threatening event.[32] In many cases of gross negligence manslaughter there is no alternative offence for which the wrongdoer can be prosecuted if his victim survives for more than a year and a day.[33] In other cases,[34] the defendant will receive a much lower sentence if his victim dies more than a year and a day after the commission of the wrongful act than if the death occurred within that period.

[28] Even if the question were to come before the courts, it is arguable that they would be prevented from holding that the rule should be abolished by the principle against retrospective legislation enshrined in Article 7 of the European Convention on Human Rights: see para 6.25 below. This argument was raised in *R v R* [1992] 1 AC 599, but was dismissed by Lord Keith, who, delivering the main speech in the House of Lords to the effect that the fact that the defendant was married to the complainant did not provide an immunity to a rape charge, approved the following statement of Lord Lane CJ in the Court of Appeal:

> "...This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it" p 623C-D.

The European Commission of Human Rights decided by a majority on 14 January 1994 that the complaint of the defendant in *R v R* that his conviction for the attempted rape of his wife concerned conduct which did not at the relevant time constitute a criminal offence under UK law, under Article 7 of the Convention, raised serious issues of fact and law under the Convention, the determination of which should depend on an examination of the merits. It followed that this part of the application could not be dismissed as manifestly ill-founded within the meaning of Article 27 para 2 of the Convention and was, therefore, admissible.

[29] *R v Inner West London Coroner ex parte De Luca* [1989] QB 249.

[30] See paras 2.13 and 3.13 below.

[31] Involuntary Manslaughter, Consultation Paper No 135.

[32] See the Darlington, Cambridge and Oxford cases, referred to at paras 1.7 above, 1.8 above and 4.3-4.4 below.

[33] See, for example, para 4.5 below.

[34] This is the case, for example, for statutory road traffic offences involving death: see paras 4.39-4.45 below.

1.13 For all these reasons, we were very pleased that the Home Office shared our view, which we reached earlier this year in the context of our project on involuntary manslaughter,[35] that it was high time for us to conduct a thorough review of the rule.

1.14 In Part II of this Paper we examine the historical background and the present application of the rule. In Part III, we refer to the evidence before the CLRC and the Nathan Committee, to the views of those committees, and to some recent developments. In Part IV, we consider the issues which we believe to be relevant in any discussion of the changes, if any, which should be made to the rule. In Part V, we deal with possible problems that would arise if the rule was abolished: in particular we consider possible safeguards for a defendant in these circumstances. In Part VI we set out various options for reform, and we ask readers for their views on these options. Finally, our provisional proposals and questions for consultation are summarised in Part VII. Readers who are interested in the way this matter is treated in other jurisdictions will find this set out in Appendix B.

[35] See Involuntary Manslaughter, Consultation Paper No 135, paras 1.25-1.26.

PART II

HISTORICAL BACKGROUND AND PRESENT STATUS OF THE YEAR AND A DAY RULE

Historical origins of the rule

2.1 It has been suggested[1] that the origin of the present substantive rule was a procedural time limit which was imposed upon certain homicide proceedings. Historically, when a homicide occurred, two different actions could be brought: proceedings at the king's suit (a public prosecution) and an appeal for felony of death.[2] It was customary for an appeal for felony of death, which was the equivalent to a private prosecution by interested parties, usually the relatives of the victim, to be instituted first.

2.2 Originally there was no set time limit, although the appeal proceedings had to be brought without delay. In 1278, however, a statute[3] provided that if the relative sued within a year and a day after the "deed" was done, the appeal would stand. The intention of the Act was to simplify the procedure which had previously existed. It was interpreted, however, as imposing a rule that if proceedings were not brought within the specified period, the right to bring appeal proceedings was lost.

2.3 The development of this rule from being a rule of procedure to becoming a rule of substantive law has been traced by Yale.[4] He suggests that the judges

> "...simply announced the proposition that the criminal could not be proceeded against as a murderer when a year had gone by before death ensued [and] since it was expressed as a general rule it was adopted as the rule for the felony itself".[5]

In his opinion, the rule was the result of "historical accident" and

[1] See generally DEC Yale "A Year and a Day in Homicide" [1989] CLJ 202.

[2] The proceedings were not alternatives; both could be brought in respect of the same death. It became the practice of the Crown not to bring proceedings at the king's suit until the expiration of the time limit imposed upon private prosecutions. This caused some difficulty since private parties were slow at initiating proceedings. An Act of 1486 (3 Hen VII c 1) expressly gave the Crown the authority to proceed before the expiration of a year and a day. The 1486 Act stated that it was necessary to bring proceedings without delay for "by the end of the year all is forgotten". This may suggest that, in part, the year and a day rule was based on evidential necessity: the need to bring proceedings within a period in which cogent evidence could be readily obtained.

[3] Statute of Gloucester, 6 Edw 1, c 9 (1278).

[4] DEC Yale "A Year and A Day in Homicide" [1989] CLJ 202.

[5] *Ibid*, p 207.

> "it is not wonderful that a rule which denied the actionability by appeal for homicide should have been considered applicable to all prosecutions on account of the death."[6]

2.4 Holdsworth[7] also identifies a connection between the rule of procedure and the substantive rule. He identifies early authority[8] establishing an additional function for the rule as a presumption of causation reversing the burden of proof.

> "At an early date the rule was laid down that if death ensued within a year and a day sufficient connection [between the act and the death] would be presumed. Perhaps this period was connected with the fact that it was the length of time within which the relatives of the murdered man were able to bring their appeal."[9]

From this presumption developed the modern rule that if death ensued after a year and a day a sufficient connection can never be shown.

2.5 Although the source of the substantive rule seems to have been the time limit imposed upon appeals for felony of death, the year and a day provision as part of the definition of homicide gained an existence independent of its source. This is illustrated by the different provisions which related to the date on which the year and a day period started. The year and a day in the definition of homicide begins with the infliction of injury, but when calculating the period in which an appeal for felony of death could be brought the time started from the date of death.[10] Blackstone wrote:

> "In order...to make the killing murder, it is requisite that the party die within a year and a day *after the stroke received, or cause of death administered.*"[11]

2.6 However, in his discussion of the appeals of death under the statute of Gloucester, he said:

6 *Ibid*, p 206.

7 Sir William Holdsworth, *A History of English Law* vol III (5th ed 1942) p 315.

8 Fitz Ab Corone (1330) 303.

9 Sir William Holdsworth (*op cit*) p 315.

10 *Coke's Institutes* (1809) vol 1 part II p 320; *Heydon's case* (1586) 4 Coke's Reports 41. It is argued by Coke that until the date of death no felony has been committed and that for this reason the period in which to bring an appeal for a felony should not start until death. The authorities are not wholly consistent. Staunford's *Les Plees del Coron* f.63r, stated that the period was calculated from the date of injury. Cases support this proposition: see Sayle's *Select Cases in the Court of the Kings Bench* vol III p 109. Yale in [1989] CLJ 202 supports Staunford's approach and suggests that the rule never underwent a change in form but only one of function.

11 *Blackstone's Commentaries* (1811) Book 4 p 197 (emphasis added).

> "...all appeals of death must be sued within a year and a day after *the completion of the felony by the death of the party*".[12]

This distinction is found in other historical legal works.[13] When the appeals of death procedure was abolished in the reign of George III, the procedural time limit went too, but its abolition did not affect the continuing existence of the year and a day rule as a substantive rule of law.

2.7 Coke[14] wrote that an essential ingredient to the crime of murder was that "the party wounded, or hurt, etc die of the wound, or hurt, etc within a year and day after the same". The 'day' was added merely to indicate that the 365th day after the day of the injury must be included. This indication was made necessary by the existence of an old rule (now obsolete) that, in *criminal law*, when reckoning a period 'from' the doing of any act, the period was to be taken (in the prisoner's favour) as beginning on the very day when the act was done.[15]

Present status of the rule

2.8 In addition to forming part of the law of murder, the rule also applies to the law of manslaughter. In *Dyson*,[16] the accused inflicted injuries on a child in November 1906 and again in December 1907. The child died in March 1908. The trial judge directed the jury that the accused could be found guilty of manslaughter if the death was caused by the injuries inflicted in November 1906. Lord Alverstone CJ, giving the judgment of the newly created Court of Criminal Appeal, held that this was a clear misdirection because:-

> "it is still undoubtedly the law of the land that no person can be convicted of manslaughter where the death does not occur within a year and a day after the injury was inflicted, for in that event it must be attributed to some other cause".[17]

2.9 It is significant that the court was expressing an unequivocal proposition. In so doing, it turned what was probably a question of fact for a jury to decide (that is, the question of causation), into an irrebuttable presumption of law. In due course,[18] we will consider

[12] *Blackstone's Commentaries* (1811) Book 4 p 315 (emphasis added). He thought that this was declaratory of the old common law and made reference to the position in the Gothic constitutions.

[13] Hale's *Pleas of the Crown* (1736) p 427.

[14] *Coke's Institutes*, (1809) vol 1 part III, p 47.

[15] JW Cecil Turner, *Kenny's Outlines of Criminal Law* (19th ed 1966) p 135.

[16] [1908] 2 KB 454.

[17] *Ibid*, p 456.

[18] See paras 4.8-4.12 below.

whether the task of the jury should be restricted in this way while it remains unrestricted for deaths within a year and a day.

2.10 The rule has also been imported into the statutory crime of infanticide.[19] Section 1(1) of the Infanticide Act 1938[20] empowers a court to convict for infanticide "notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder." Accordingly when more than a year and a day has elapsed between the initiating act and the death, a defendant cannot be convicted of infanticide because she could not have been convicted of murder.

2.11 The Divisional Court has held[21] that the rule also applies to killings pursuant to a suicide pact, reduced to manslaughter by section 4(1) of the Homicide Act 1957,[22] and aiding and abetting suicide contrary to section 2(1) of the Suicide Act 1961.[23] It decided at the same time that a verdict of suicide could not be returned at an inquest if death occurred more than a year and day after the relevant injury had been inflicted by the deceased. This case has possible consequences for life assurance which we will discuss in paragraph 3.21 below.

2.12 The *De Luca* case is also of importance because of the approach of Bingham LJ, who pointed out that the court could take one or other of two views, namely:-

> "One is that taken by this coroner... . The year and a day rule is an anomalous relic of a (no doubt fully justified) distrust of medical science in medieval times. It may have provided, and provides, a useful if arbitrary rule of thumb where crime is concerned. It should not be extended into a field where no criminal liability is involved so as to preclude an objective scientific inquiry by a coroner into how, when and where a deceased person came by his death and the giving of a verdict of suicide where this is

[19] *Per* Bingham LJ and Hutchison J in *R v Inner West London Coroner ex parte De Luca* [1989] QB 249, 252E and 254H.

[20] See Appendix A.

[21] *R v Inner West London Coroner ex parte De Luca* [1989] QB 249, 253.

[22] See Appendix A.

[23] See Appendix A. However, although Bingham LJ in *De Luca* indicated obiter, that he thought the rule would apply to aiding and abetting suicide under s 2(1) of the Suicide Act 1961, it is arguable that the application of the rule to this offence would in fact have no effect. Section 2(1) provides that:

> "A person who aids, abets, counsels or procures the suicide of another, *or an attempt by another to commit suicide*, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years."(emphasis added)

If a defendant encourages and helps another to take an overdose and the victim eventually dies after two years in a comma, because of the year and a day rule, the victim could not be held to have committed suicide by a coroner. However, it is arguable that there has been an attempted suicide, even before the victim dies, so that the helper will commit the offence under s 2(1) despite the application of the year and a day rule.

established on the facts. The alternative argument is that...[s]uicide may, as such, have ceased to be a crime but it has not lost all its criminal implications. Although no longer a crime, suicide remains the creature which the common law recognised, including the year and a day requirement. A stigma remains, particularly to those of certain faiths. A verdict of suicide (however the language is softened) should not be recorded now that suicide is no longer criminal when it could not have been recorded when it was. The rule that after passage of a year and a day death must be attributed to some other cause should be applied now as it would have been then."[24]

2.13 He concluded that "[w]hile good social arguments could be advanced for abrogating the rule for purposes of [offences under sections 4(1) of the Homicide Act 1957 and 2(1) of the Suicide Act 1961][25] and murder and manslaughter, I see very little social advantage in abrogating it for the purposes of a coroner's verdict alone."[26]

2.14 It also seems quite likely that the rule applied to the now defunct offence of causing death by reckless driving. In *R v Governors of Holloway ex parte Jennings*,[27] Lord Roskill said that the legal ingredients of manslaughter and of causing death by reckless driving under the statutory provisions were identical.[28] If this dictum was to be followed to the letter, the year and a day rule would have to be applied to the statutory offence in the same way as it is applied to manslaughter at common law.[29] On 1st July 1992, the earlier statutory offence was replaced by a new statutory offence of causing death by dangerous driving.[30] The difference between the new offence and the old offence is essentially that the new offence is directed at the manner of the defendant's driving,[31]

[24] *R v Inner West London Coroner ex parte De Luca* [1989] QB 249, 253H-254C.

[25] See Appendix A (footnote added).

[26] *R v Inner West London Coroner ex parte De Luca* [1989] QB 249, 254D-E. A similar approach was adopted by the Nathan Committee, see paras 3.13-3.14 below.

[27] [1983] 1 AC 624.

[28] *Ibid*, 644H-645A.

[29] Carter and Harrison express a contrary view in *Carter and Harrison on Offences of Violence* (1st ed 1991) p 21. The only reason which they give is that the time limitation does not apply to statutory offences. However, it would seem that the rule applies to the statutory offences of aiding and abetting suicide contrary to s 2(1) of the Suicide Act 1961, killing in pursuance of a suicide pact under s 4(1) of the Homicide Act 1957 and infanticide, under s 1(1) of the Infanticide Act 1938 (although these last two offences draw heavily on the common law crimes of murder and manslaughter): see paras 2.10 and 2.11 above and Appendix A. DEC Yale in "A Year and a Day in Homicide" [1989] CLJ 202, 210, states that "it seems likely that the rule also applies to the causing of death by reckless driving."

[30] This was inserted into the Road Traffic Act 1988 by s 1 of the Road Traffic Act 1991: see Appendix A.

[31] The new offence covers those whose driving falls far below what would be expected of a competent and careful driver - see Road Traffic Act 1988 ss 1 and 2A (as amended): see Appendix A.

whereas the old offence required an assessment of the defendant's state of mind. Smith and Hogan believe that the rule still applies to the new offence,[32] since an element of the offence is "causing the death of another"[33] but there is no judicial authority covering this point. The same reasoning would result in the rule covering not only the new offence of causing death by careless driving when under the influence of drink or drugs[34] but also that of causing death by aggravated vehicle taking.[35]

2.15 We will assume for the rest of this Paper that the rule applies to the statutory offences of causing death which are contained in modern statutes concerned with the use of vehicles on the road.[36] If we are wrong, it shows that the law is illogical and inconsistent since we are unaware of any cogent reasons for distinguishing the treatment of motoring offences from other offences which contain a requirement that there should have been a death.

2.16 It would appear, therefore, that the rule has been repeatedly extended by analogy and that it now applies to every offence in which death is an ingredient,[37] as well as to the analogous finding of suicide by a coroner's verdict. In both the cases reported this century in which the rule has been considered,[38] the courts have been very conscious of its anomalous nature. Thus even in 1908 "the rule was regarded as something of an anachronism."[39] Nevertheless neither the courts nor the Nathan Committee[40] have been prepared to abolish it in one context and yet leave it in force for other offences. It is for this reason that we now consider the rule in relation to all the offences to which it applies or might apply.

[32] JC Smith and B Hogan, *Criminal Law* (7th ed 1992) p 331.

[33] Section 1 of the 1988 Act as amended: see Appendix A.

[34] Section 3A of the Road Traffic Act 1988 introduced by s 3 of the Road Traffic Act 1991: see Appendix A.

[35] Section 12A of the Theft Act 1968, introduced by s 2(1) of the Aggravated Vehicle Taking Act 1992: see Appendix A, in particular ss 12(1), 12A(1), (2) and (4). While the offence of aggravated vehicle taking itself, under s 12A(2)(b), is committed if injury rather than death is caused, s 12A(4) provides that:

> "if it is proved that, in circumstances falling within subsection (2)(b) above, the accident caused the death of the person concerned, [a person shall be liable on conviction on indictment to imprisonment for a term not exceeding] five years."

This section, therefore, creates a separate offence: *Courtie* [1984] AC 463.

[36] See Appendix A.

[37] It is possible that the rule also applies to the offence created by s 27(2) of the Merchant Shipping Act 1970, as amended by s 32 of the Merchant Shipping Act 1988, of doing any act which causes or is likely to cause the death of or serious injury to any person: see Appendix A. However, if indeed it does apply, it is unlikely to have any real effect because of the structure of the offence.

[38] *Dyson* [1908] 2 KB 454 and *R v Inner West London Coroner ex parte De Luca* [1989] QB 249.

[39] *Per* Hutchison J in *R v Inner West London Coroner ex parte De Luca* [1989] QB 249, 254G.

[40] See paras 2.13 above and 3.13-3.14 below.

2.17 We must refer to a problem that arises where there is a delay between the "initiating act", the injury and the death. In such cases, it is unclear whether the year and a day period starts to run from the time of the initiating act or the injury. An example of this type of case would be where a bomb was planted with a timer which would activate the bomb some time after it was planted. A case of this type never appears to have arisen to be decided by the courts: in *De Luca* the deceased took his life by shooting himself, and similarly in *Dyson* there was no interval between the initiating act and the injuries.

2.18 When the Criminal Law Revision Committee[41] considered the rule, it recommended "that the time should run from the infliction of injury as opposed to the act which causes death".[42] It is unsatisfactory that it is not now completely clear whether it would be safe to launch a prosecution for homicide if, for example, a doctor recklessly prescribes the wrong drugs and in consequence his patient dies, say, two years later.

[41] See paras 3.2-3.4 below.

[42] CLRC 14th Report para 40.

PART III

THE VIEWS OF THE CRIMINAL LAW REVISION COMMITTEE AND THE SELECT COMMITTEE ON MURDER AND LIFE IMPRISONMENT ON THE RULE, AND RECENT DEVELOPMENTS

Introduction

3.1 Two eminent Committees have in the last twenty years considered the rule. Neither has advocated its abolition but their approaches have been different. We here discuss their approaches and then mention some recent developments.

The Criminal Law Revision Committee

3.2 The CLRC issued a Working Paper on Offences against the Person in 1976[1] in which it sets out its provisional view on the rule:-

> "The reason for this rule, which applies to manslaughter as well [as murder], was apparently the difficulty of tracing causation where a long interval elapsed between the infliction of the injury and the death. An illustration of this can be found in the case of *Dyson* [1908] 2 KB 454. It is arguable that with the advance of medical science such a rule is no longer necessary. We think, however, that it would not be right for a person to remain almost indefinitely at risk of prosecution for murder; we therefore recommend that the new definition of murder should require that the death occurred within a year from the time when the injury was inflicted".[2]

3.3 In March 1980 the CLRC published its final report[3] and decided in respect of the rule that:-

> "A killing cannot amount to murder unless death occurs within a year and a day of infliction of injury. The longer the gap between the injury and death the more difficult it is to decide whether the injury is a cause of death. We reaffirm the view expressed in our Working Paper (paragraph 44) that, although with the advance of medical science it is arguably no longer necessary to retain the year-and-a-day rule, it would be wrong for a person to remain almost indefinitely at risk of prosecution for murder. A line has to be drawn somewhere and in our opinion the present law operates satisfactorily. When death follows over a year after the infliction of injury the killer does not necessarily escape justice. He may be charged with attempted murder or causing grievous bodily harm with intent, both of which are punishable, and, if our recommendations are accepted, will continue to

[1] CLRC Working Paper on Offences against the Person, August 1976.

[2] *Ibid*, para 44.

[3] CLRC Fourteenth Report: Offences against the Person, (1980) Cmnd 7844.

be punishable, with life imprisonment. Accordingly, we recommend that killing should not amount to murder unless death follows before the expiration of a year after the day on which the injury was inflicted.

"In the majority of cases of murder the act which causes death (for example, the firing of a gun) and the infliction of injury (for example, the entry of a bullet into the victim's body) occur almost at the same time. In some cases, however, this is not so: the act which later causes injury may occur a substantial period of time before the actual infliction of injury. A decision therefore has to be made whether time should run from the act or the infliction of injury. A case that directly raises the issue is where a person places in a deserted building a booby-trap bomb which explodes more than a year later, killing a person instantly. If time were to run from the placing of the bomb, the killing could not be murder; it could be murder if time ran from the explosion. In such a case it would be wrong if a verdict of murder could not be returned. We have already explained that the year-and-a-day rule exists only to avoid uncertainties which may arise in cases where a person survives the infliction of injury upon him for a substantial time. In view of this, we recommend that time should run from the infliction of injury as opposed to the act which causes death. Where pre-natal injury is inflicted, time should run from birth".[4]

3.4 Thus two arguments commended themselves to the CLRC, namely, (1) difficulties with causation when there is a gap between injury and death, and (2) the fact that it would be wrong for a person to remain almost indefinitely at risk of prosecution for murder. We will reconsider the force of these arguments in Parts V and VI below.

The Draft Code

3.5 This Commission has prepared a draft Criminal Code for England and Wales.[5] In accordance with its general policy of not including law reform proposals, as such, in this document apart from recent unimplemented recommendations of expert bodies such as the CLRC,[6] the Commission preserved the year and a day rule in the draft Code.[7] No independent or fresh thought, therefore, was given to the rule when the Code was formulated.

[4] CLRC 14th Report, paras 39-40.

[5] A Criminal Code for England and Wales (1989) Law Com No 177 Report and Draft Criminal Code Bill.

[6] Law Com No 177, para 3.34.

[7] *Ibid*, clause 53(b).

The Nathan Committee

3.6 Towards the end of the 1980s the rule was considered by the Nathan Committee.[8] This committee received evidence on the rule from the Crown Prosecution Service[9], the Law Commission[10], the Association of Chief Police Officers of England and Wales (Crime Committee)[11], the Howard League for Penal Reform[12] and the Scottish Crown Office,[13] together with oral evidence by the Home Advocate Depute.[14]

3.7 The evidence of the CPS was that:-

> "The definition of murder was formulated in an age in which modern medical advances were not dreamed of, let alone their legal implications appreciated. The "year and a day" rule was designed to import some measure of certainty into the law, both to prevent the accused from remaining under the threat of prosecution regarding a crime for which the penalty was death, and to mark the length of time beyond which the prosecution might be in great difficulties in demonstrating the necessary causal link between the act of the accused and the resulting death of the victim. The former consideration remains valid today, though we do not attach the same weight to it as the Criminal Law Revision Committee did in their 14th Report published in 1980, entitled "Offences against the Person"; the latter consideration has lost much of its force because of the advances made in the medical field which enabled life to be sustained by artificial means.
>
> "The increasing use of life support machines to maintain individuals, who in the natural course of events would die, has meant that there may now be cases in which death does not occur within a year and a day (either in terms of brain death or heart death), yet where there can be no doubt about the causal link between the act of the accused and the harm sustained by the victim.
>
> "We would further point out that the court has an inherent jurisdiction to stay proceedings as an abuse of the process due to the passage of time. In our view this is an adequate safeguard to protect the individual from an over-

[8] The Report of the House of Lords Select Committee on Murder and Life Imprisonment (1989) HL 78.

[9] Hereafter "CPS": see para 3.7 below.

[10] See para 3.8 below.

[11] See para 3.9 below.

[12] See para 3.10 below.

[13] See para 3.11 below.

[14] See para 3.12 below.

zealous and tardy prosecution. Accordingly, we consider that it is inappropriate in modern times to maintain the "year and a day" rule and we recommend its abolition".[15]

3.8 In the Law Commission's submission to the Nathan Committee we said:

> "The Commission doubts whether, in modern medical conditions, it is justifiable to maintain the "year and a day rule" as an inflexible rule of law. Cases can easily be imagined where death took place after a longer period had elapsed, but had been clearly caused by the accused. Apart from that point, the Commission agrees with the CLRC's recommendations as to the *actus reus* of murder".[16]

3.9 The Association of Chief Police Officers of England and Wales gave evidence on this point along the following lines:

> "There are two areas today of concern, those of "causation" and "malice aforethought". It is felt in some areas that the term "death to occur within a year and a day" is not in keeping with modern trends. With the advances of modern science, a person who is subjected to serious injury may be kept alive well beyond a year and a day, yet should he die his/her death could be attributed to the original injury. It is felt that the "year and a day" presents a reasonable time in which the line of causation can be traced. To go beyond that period would put the potential accused on tenterhooks far longer than is reasonably necessary".[17]

3.10 The Howard League for Penal Reform said:

> "In paragraph 39 of their 14th Report, the CLRC set out the arguments for and against retaining the "year and a day" rule in the *actus reus* of murder. While the rule was not originally introduced for this purpose, the best reason for retaining some such limitation in the modern law on the period of time which may elapse between the infliction of the original injury and the death is that it would be wrong for a person to remain almost indefinitely at risk of prosecution for murder. Where death follows after the expiry of this period the defendant may still be charged with attempted murder, if the intent to kill can be proved, or of wounding the victim with intent to cause grievous bodily harm. Any period of time is inevitably rather arbitrary and

[15] Nathan Committee Report vol II Oral Evidence, part 1, (1989) HL 78-II, p 92. We consider the inherent jurisdiction to stay for abuse of process due to passage of time in paras 5.15-5.20 below.

[16] Nathan Committee Report vol II Oral Evidence, part 1, (1989) HL 78-II, p 117.

[17] Nathan Committee Report vol III Oral Evidence, part 2, (1989) HL 78-II, Supplementary Memorandum: Report prepared by senior officers of West Yorkshire Police, p 341.

there is merit in retaining the current position rather than substituting some other period. We agree with the CLRC's suggestion and note that the Law Commission has adopted this suggestion in the Draft Criminal Code, paragraph 69(b)".[18]

3.11 The Scottish Crown Office told the Nathan Committee that Scottish law did not distinguish between immediate death of the victim and lingering death caused by the injury.[19]

3.12 Another Scottish witness, Mr Penrose,[20] gave evidence to the effect that he could not see any logical justification for the rule, which did not apply in Scotland.

3.13 In the event, the Nathan Committee, which was only concerned with murder, concluded that:

> "[T]he "year and a day rule" is not particular to the law of murder. It applies also to manslaughter and to the offence of aiding, abetting, counselling or procuring suicide, contrary to the Suicide Act 1961.[21] Whatever the merits or demerits of the rule, it would not be appropriate to abolish it for the law of murder while leaving it in force with respect to these other offences of homicide which are outside the Committee's terms of reference. The Committee recommend that no change should be made in this aspect of the law."[22]

3.14 Like Bingham LJ,[23] it took the view that the rule could not be abolished in respect of only one offence but that it had to be examined in the context of all the offences to which it applied.

Recent developments

3.15 The rule was recently attacked in the House of Commons by Alan Milburn MP,[24] following the death of one of his constituents 16 months after he was attacked in the

[18] Nathan Committee Report vol III Oral Evidence, part 2, (1989) HL 78-III, p 354.

[19] *Ibid*, p 403.

[20] The Home Advocate Depute, that is the Senior of Deputies to the Lord Advocate in Scotland: Nathan Committee Report vol III Oral Evidence, part 2, (1989) HL 78-III, p 421.

[21] See Appendix A (footnote added).

[22] Nathan Committee Report (1989) HL 78-I, para 34.

[23] In *R v Inner West London Coroner ex parte De Luca* [1989] QB 249, 254D-E: see para 2.13 above.

[24] Written Answer, *Hansard* (HC) 5 November 1993, vol 231, col 527; *Hansard* (HC) 2 December 1993, vol 233, col 1161 (question to Prime Minister).

centre of Darlington.[25] He later proposed an amendment[26] to the Criminal Justice and Public Order Bill in the following terms:-

> "The presumption in criminal law that the offence of **murder** shall occur only if the party wounded or hurt dies of the wound or hurt within a year and a day shall be abolished."(emphasis added)

It will be noted that this proposed amendment only applied to murder.

3.16 Mr David Maclean MP,[27] answering on the Government's behalf, accepted that medical science had moved on and that this left the rule in an unsatisfactory position. However, he was prevented from accepting the new clause immediately for two reasons: it did not provide a mechanism to control potentially unlimited liability for murder, and it dealt only with murder and not with the other offences to which the rule applies, particularly manslaughter. On this basis, he was satisfied that it was appropriate to institute a thorough and urgent re-examination of the rule and he told the Standing Committee that the Law Commission had agreed to consider the matter.[28]

3.17 The issue was raised again at the report stage of the same Bill.[29] Mr Milburn again sought to introduce a clause to remove the year and a day rule, although this time the proposed clause covered not only murder but also manslaughter. He was supported by Mr Alex Carlile QC MP, who stressed that the law in England and Wales was out of step with that in Scotland and indeed the rest of Europe. Mr Maclean again agreed that he was personally inclined to the view that abolition would turn out to be the only sensible reform, but he resisted the introduction of the clause on the grounds that the issue was not as simple as was being suggested[30] and that the Law Commission had already independently arrived at a decision to review the rule. The new clause was defeated by 17 votes.[31]

3.18 The present position is that academic writers,[32] the Crown Prosecution Service[33] and

[25] The Darlington case: see para 1.8 above and para 4.3 below.

[26] *Hansard* Criminal Justice and Public Order Bill: Standing Committee B, Twenty-Sixth Sitting, 3 March 1994 (morning), cols 1159-1167.

[27] The Minister of State at the Home Office.

[28] With some reluctance, the clause was withdrawn before it was voted upon.

[29] *Weekly Hansard* (1994), Issue No 1651, vol 241, cols 86-90.

[30] *Ibid*, col 89. He referred to the decisions of the CLRC and the Nathan Committee not to recommend abolition of the rule.

[31] The House Divided Ayes 260, Noes 277.

[32] See for example Andrew Ashworth, *Principles of Criminal Law* (1st ed 1991) p 229 "In principle, it seems unjust that a homicide conviction should not be possible in such a case, if all the other elements can be established and only the "year and a day" rule stands in the way ... . The rule itself is out of accord with modern medical conditions and should be abolished". Yale concluded his article "A Year And A Day In Homicide" by stating that "[the rule's] continuing

foreign law reform bodies[34] are and remain critical of the rule. Further, as is discussed in Appendix B, the rule has been abandoned in all but one state in Australia,[35] and in a number of American states.[36] It does not form part of the Model Penal Code in the USA.

3.19 The rule is causing problems in criminal cases, as to which we will refer in greater detail in Part IV below. In the first place, as we noted in paragraph 1.12 above, difficulties are arising where a victim of a serious assault is kept on a life support machine and only dies after more than a year and a day from the date of the impact.[37] In the second place, cases are arising where, as a result of medical negligence or any other case of gross negligence manslaughter, a victim dies more than a year and a day after the injury was caused by the wrongful act.[38] In these cases there is the added difficulty that there is frequently no alternative offence with which the wrongdoer can be charged. A further phenomenon has occurred in Australia, where a victim has been deliberately infected with the AIDS virus and died more than a year and a day after that event.[39] If the deliberate infliction of the AIDS virus could form the basis of a charge of murder or manslaughter in English law, the same problems would be likely to arise.

utility must be open to serious question," [1989] CLJ 202, 213.

[33] See para 3.7 above.

[34] See, for example, the Law Reform Commission of Canada, "Recodifying the Criminal Law"; Queensland Criminal Code Review Committee, Final Report of 1992; The New Zealand Crimes Consultative Committee in its 1991 Report on the Crimes Bill 1989, discussed in Appendix B.

[35] The rule has been removed from the Codes in Western Australia and Tasmania, and from the law of the common law states of Victoria, South Australia and New South Wales: see Appendix C for the statutory provisions.

[36] Massachusetts - *Commonwealth v Lewis* (1980) 381 Mass 411, 409 NE 2d 771, Michigan - *People v Stevenson* (1982) 416 Mich 383, 331 NW 2d 143, New Jersey - *State v Young* (1978) 77 NJ 245, 390 A 2d 556, *People v Brengard* (1934) 265 NY 100, 191 NE 850.

[37] See for example the Darlington case referred to in paras 1.8 above and 4.3 below; the Cambridge case referred to in para 1.7 above and the Oxford case referred to in para 4.4 below.

[38] See for example the case referred to in para 4.5 below. Where the victim is on a life support machine it is easy to envisage a case where the negligence does not take effect in the sense of causing death for more than a year and a day after the injury was caused: see paras 2.17-2.18 above.

[39] See a 1990 article written by Mr Dowd, the Attorney General of New South Wales, "Law is gunning for the syringe bandits" [1990] The Australian p 11, prompted by a robbery in Sydney by bandits armed with syringes said to be filled with AIDS-infected blood. He recognised that the common law year and a day rule would almost always prevent a murder conviction in a case of deliberate infection with the HIV virus because it takes a number of years for infection with the virus to lead to an AIDS related death. The rule will prevent prosecution for murder even though it may often be possible for a doctor to say that a person's death was caused by the intentional infliction of the virus. The rule would operate unjustly to prevent prosecution for murder in such a case and he concluded that the rule required modification. The rule has since been abolished in New South Wales by the Crimes (Injuries) Amendment Act 1990 (NSW): see Appendix C.

3.20 The fact that a person is not legally regarded as having committed suicide if more than a year and a day elapses between the time of the act which causes his death and the actual death itself gives rise to two different consequences. In the first place, as we have seen, the inquest is not entitled to reach a verdict of suicide.[40]

3.21 The second consequence, as we have already indicated in paragraph 2.11 above, is that there may be problems for insurance companies who seek to avoid liability for life cover on the grounds that the assured committed suicide if more than a year and a day elapsed between the relevant act and the death.[41] Since the Suicide Act 1961, which abolished the rule that suicide was a crime, the rule of public policy that no man might derive an advantage from his own criminal act has no longer applied as a general limitation to prevent the deceased's personal representatives from claiming under a life assurance policy if the cause of death was suicide. It appears, however, from some dicta of Lord Atkin and Lord MacMillan in *Beresford v Royal Insurance Co Ltd*[42] that personal representatives of an assured may be prevented from recovering on the quite different ground that a man may not by his own deliberate act cause the event upon which the insurance money is payable. It is an implied term in every insurance contract that the assured is not entitled to recover if the relevant loss is caused by his own wilful misconduct. This rule will only apply in cases where a policy holder committed suicide while of sound mind. It is also possible that policy conditions will expressly cover this point, although generally no suicide exception clause is inserted.[43] In order to defeat claims under policies which have been effected with a view to suicide, some companies exclude from the risk death by suicide occurring within a specified period (usually 12 or 13 months), or, more unusually, at any time.[44] Although we are not aware of any cases on the point, it is possible that in such a case, or in a case covered by the general implied term preventing recovery in the event of wilful misconduct, the year and a day rule would nevertheless permit recovery under the policy if the deceased died more than a year and a day after the event initiating his suicide. Considerations like these show that the rule may have a wider significance than might have appeared at first sight.

3.22 We now consider the issues which appear to be of significance in determining the future of the rule.

[40] See *R v Inner West London Coroner ex parte De Luca* [1989] QB 249 and para 2.11 above.

[41] As, for example, in the *De Luca* case, para 2.11 above.

[42] [1938] AC 586, 595 and 602.

[43] Raoul Colinvaux, *The Law of Insurance* (5th ed 1984) p 337.

[44] Malcom A Clark, *The Law of Insurance Contracts* (1989), para 24-6C.

PART IV

THE ISSUES

Introduction

4.1 In this Part, we consider the matters which we believe to be relevant in any discussion of the changes, if any, which should be made to the rule. The onus of justifying changes rests on those who advocate them. We start, therefore, by considering the reasons why some people consider that this old rule should be abolished or amended. We then set out the arguments which have been regarded as justifying its continuation. Whenever we consider it appropriate, we refer to the way in which the matter is dealt with in other jurisdictions. A full description of the law in other jurisdictions, however, will be found in Appendix B.

Does the rule prevent murderers and others from being prosecuted for the correct crime or at all?

4.2 We believe that many members of the public would be extremely surprised to learn that a person who intentionally causes death cannot be convicted of murder if his victim has been kept on a life support machine for over 12 months before dying. Of course the perpetrator of the crime may be convicted of other offences, such as attempted murder, causing grievous bodily harm with intent[1] or malicious wounding.[2] We will later refer to the differences in sentencing practice between murder on the one hand and these other offences on the other.[3] Nevertheless we believe that many would be dismayed at the prosecution having to proceed with a less serious charge than murder merely because of the existence of this rule and, more particularly, because of the fortuitous fact that the victim might have been kept alive on a life support machine for more than a year and a day.

4.3 As we have already said,[4] the rule came under attack in the House of Commons from Alan Milburn MP as a consequence of the Darlington case. Because of the rule his attacker could not be prosecuted for murder or manslaughter. Instead he was convicted of inflicting grievous bodily harm and was sentenced to two years imprisonment: he was released after serving eighteen months. This case attracted a great deal of publicity, particularly in the Darlington area,[5] and provoked huge public outrage.[6]

[1] Under s 18 of the Offences against the Person Act 1861: see Appendix A.

[2] *Ibid*, s 20: see Appendix A.

[3] See paras 4.27-4.35 below.

[4] Paras 3.15-3.17 above.

[5] The *Northern Echo* has published a number of articles since the attack took place covering the Coroner's inquest, Michael's eventual death, and the attempts to bring about a change in the law: see, for example, 7 May, 31 August and 1 September 1993, and 16 March and 20 April 1994.

4.4 This is by no means the only example of a person avoiding a charge of murder or manslaughter because of the existence of the rule. Our researches have identified a number of similar cases. For example, a case was reported in the Oxford Times[7] in which the victim of a savage stabbing died nearly two and a half years later. His assailant, Anwar Zeb, was convicted of unlawful wounding with intent to cause grievous bodily harm, under section 18 of the Offences against the Person Act 1861,[8] and was sentenced to 10 years imprisonment. He would, therefore, have had a sufficient mens rea for murder.[9] It is difficult to know the precise number of cases each year which are affected in this way because the prosecuting authorities do not normally keep the relevant details.

4.5 The rule does not merely prevent people from being charged with murder; it also applies in other cases. We understand that in a recent case, a victim sustained severe brain damage, allegedly due to serious medical negligence. He has been on a life support machine for over a year and a day and is now expected to die within the next 12 months. When the victim has died, it will not be possible to prosecute those who may be responsible for manslaughter because of the rule. Should consideration be given to charging the practitioner with inflicting grievous bodily harm, even this lesser charge might not be pursued because, on the facts of the case, he might not have been said to have "inflicted" the harm.[10] We regard the operation of the rule in this type of situation as particularly disturbing, because it has the unexpected result of giving someone who may have been grossly negligent immunity from prosecution if his victim survives for more than a year and a day, because there is no alternative offence with which he could be charged.[11]

4.6 We are aware of another incident which relates to a victim who died as a result of the administration of drugs. In ordinary circumstances, the defendant would have been

[6] We received a petition on 5 May 1994, from people in the Darlington area expressing their dissatisfaction over this case, and calling for the abolition of the rule.

[7] *Oxford Times* 11 November 1988. This case is referred to by Ashworth in *Principles of Criminal Law* (1st ed 1991) p 229.

[8] See Appendix A.

[9] Since *Moloney* [1985] AC 905, it has been clearly established that the mens rea for murder is intention to kill or to cause serious bodily harm.

[10] Section 20 of the Offences against the Person Act 1861 (see Appendix A) requires the prosecution to show that grievous bodily harm was, "inflicted": see generally JC Smith and B Hogan, *Criminal Law* (7th ed 1992) pp 425-426. ""Inflict" implies the direct application of force". We recommend the removal of this "technical bar to conviction" in our 1993 Report on Offences against the Person and General Principles, Law Com No 218. All the new offences in the Draft Bill attached to that Report are expressed in terms of "*causing*" harm: see Law Com No 218 para 15.16. See also *Mandair*, *The Times* 20 May 1994 (HL), particularly Lord Mustill's dissenting speech, see official House of Lords transcript p 20.

[11] See further paras 4.25-4.26 below.

charged with unlawful act manslaughter,[12] but the death occurred more than a year and a day after the wrongful act. For this reason, he was only convicted of supplying controlled drugs (Class A),[13] for which he was sentenced to a period of five years imprisonment.

4.7 Readers might well conclude that there is realistic and cogent evidence which indicates that perpetrators of offences leading to death are avoiding prosecution for more serious offences and are in some cases avoiding prosecution completely as a result of the application of the rule. We consider[14] later in this Paper whether defendants are receiving lesser sentences because of the existence of the rule.

Does the rule prevent the jury fulfilling its fact finding functions?

4.8 It is a fundamental rule of English criminal procedure that a jury should determine all issues of fact. As Lord du Parcq put it, "When questions of fact have to be decided, there is no tribunal to equal a jury, directed by the cold impartial judge".[15] These questions of fact include all the issues which depend for their resolution on the credibility of witnesses and the weight which should be attached to their evidence, and ultimately, of course, the question whether the relevant facts have been proved to the jury's satisfaction. In the ordinary course of events, therefore, questions of causation would be dealt with by a jury. The existence of the rule, however, means that the jury *cannot* look at the issue of causation when the death occurs *more* than a year and a day after the wrongful act. We believe that there are many who would be surprised by this, particularly when they go on to realise that a jury is regarded as being able to, and does, decide on causation where the death occurs *within* a year and a day. Our researches reveal that in Scotland no problems have been caused by the absence of the rule.

4.9 It may be of interest to observe that there are very few cases in which a judge can prevent a jury dealing with an issue of fact. The most obvious case relates to identification evidence. The court's approach to such evidence results from the fact that "experience has shown [that visual identification as a category of evidence] is particularly vulnerable to error, errors in particular by honest and impressive witnesses and that this has been known to result in wrong convictions".[16] Accordingly identification evidence

[12] This type of manslaughter was considered in Consultation Paper No 135: Involuntary Manslaughter, at paras 2.1-2.56 and 6.2-6.3.

[13] Section 4 of the Misuse of Drugs Act 1971.

[14] See paras 4.27-4.45 below.

[15] Lord du Parcq, "Aspects of Law", Address to the Holdsworth Club, University of Birmingham (1948).

[16] *Junior Reid v The Queen* [1990] AC 363, 390 *per* Lord Ackner. Thus when in the opinion of the trial judge the quality of identification in evidence is poor (for example being based solely on a fleeting glance or on a longer observation made in difficult conditions), the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of identification.

must be treated with very special care;[17] and a judge is obliged to direct a verdict of not guilty where the identification evidence is of questionable value.[18]

4.10 The right of a judge to dismiss a case on the grounds that there is no case to answer is very limited. He can only do so if there is no evidence upon which a jury properly directed could convict - it is not enough for the judge to believe that it would be unsafe or unsatisfactory if the jury to convict.[19] This example shows how limited is the right of a judge to interfere with the fact-finding functions of a jury. Our readers will have to consider whether the rule constitutes an unjustifiable departure from this principle.

4.11 It may be of further interest to bear in mind that many other presumptions in English law have been abolished[20] either by statute[21] or by judicial ruling.[22] Yet this rule still continues in force. The fact that the rule prevents prosecutions has meant that it is unlikely to be reviewed by the courts.

4.12 We invite readers to consider whether this important issue of causation in trials involving people's deaths could and should be left to juries whether or not the death occurs within or outside the year and a day period.

The problems of causation

4.13 Historically, the rule has meant that a jury is precluded from determining the cause of a death as a matter of fact when the offending act took place more than a year and day before the death.[23]

[17] *Turnbull* [1977] QB 224, 229. This principle was recently confirmed by the Privy Council in *Farquharson* (1994) 98 Cr App R 398. They quashed the defendant's conviction as the judge had failed to warn the jury of the special need for caution before relying on the correctness of an identification.

[18] This principle was recently confirmed by the Court of Appeal in *Fergus* (1993) 98 Cr App R 313. The defendant's appeal was allowed on the grounds that had the weakness in the identification evidence, which was the sole basis of the prosecution's case, been properly analysed, the judges would have been bound to withdraw the case from the jury.

[19] *Galbraith* (1981) 73 Cr App R 124 CA. This case was criticised by the Royal Commission on Criminal Justice, which advocated its abolition: Royal Commission on Criminal Justice Report (1993), Cm 2263, paras 41-42.

[20] For example, there used to be a presumption that anybody who could read was a clergyman and was thus entitled to the "benefit of clergy": see DEC Yale "A Year and a Day in Homicide" [1989] CLJ 202, 207.

[21] For example, the irrebuttable presumption that a boy under the age of fourteen was not capable of having sexual intercourse and, therefore, could not be convicted of any offence of which intercourse is an element was abolished by s 1 of the Sexual Offences Act 1993.

[22] The rebuttable presumption that a child aged between ten and fourteen was incapable of committing an offence was abolished by the Divisional Court, who called the rule "unreal and contrary to common sense" in *C (a minor) v DPP*, *The Times* 30 March 1994, *per* Mann LJ.

[23] See the judgment of Bingham LJ in *R v Inner West London Coroner ex parte De Luca* [1989] QB 249, 251-254.

4.14 We believe that there are two ways in which the rule might be defended, namely:-

(i) that medical evidence cannot determine the cause of death when death occurs more than a year and a day after the offending event;[24] and

(ii) that a jury will be unable to decide on the medical evidence what the cause of death was,[25] or more particularly, to decide whether the prosecution has satisfied the burden of proving that the accused caused the death.

4.15 We will deal with each of these matters in turn. First, however, it may be useful for us to set out some legal principles relating to causation. This should make it easier for readers who are not legally qualified to appreciate the significance of medical evidence in this context. All the offences to which the rule applies[26] have one element in common, namely that in order to convict the accused it must be proved that he caused the death of the deceased. The causation test is satisfied if the prosecution can prove *some* acceleration of death.[27] It makes no difference for this purpose that the accused is already suffering from a fatal disease[28] - the test is whether there was some acceleration of death.

4.16 It follows that the defendant's act cannot be the cause of death if the death would have occurred in *precisely* the same way had that act never been performed. It must be proved that, *but for* the defendant's act, the event would not have occurred.[29]

4.17 Problems arise in cases where an intervening act or event occurs between the defendant's infliction of injury and the death. As we have already seen, the basic principle is that the defendant is not responsible for the death if the victim dies as a result of some subsequent act or event which would have caused death in just the same way *even if* the defendant had not inflicted the original injury.[30] Not every intervening act or omission, however, will relieve the defendant from liability for the subsequent death.

[24] See paras 4.19-4.20 below.

[25] See paras 4.21-4.23 below.

[26] See paras 2.7 (murder), 2.8 (manslaughter), 2.10 (infanticide), 2.11 (suicide) and 2.14 (statutory road traffic offences based on causing death) above and Appendix A.

[27] JC Smith and B Hogan, *Criminal Law* (7th ed 1992) p 331.

[28] For example in *Dyson* [1908] 2 KB 454, 457 Lord Alverstone CJ said "the proper question to have been submitted to the jury was whether the prisoner accelerated the child's death by the injuries which he inflicted ...if he did, the fact that the child was already suffering from meningitis, from which it would in any event of have died before long, would offer no answer to the charge of causing its death".

[29] *Smith and Hogan* (*op cit*) p 333. While it is sometimes said that the act must be a "substantial cause" this seems to mean only that the defendant's contribution must not be so minute that it would be ignored under the "de minimis" principle: see also *Cato* [1976] 1 WLR 110, 116-117.

[30] *Smith and Hogan* (*op cit*) p 335.

4.18 There are three different grounds on which he might still be held to have caused death, namely:-

(i) that the victim died as a result of some act or event which would not have occurred but for the act done by the defendant and which was a natural consequence of the defendant's act;[31]

(ii) that even though the victim died as a result of an unforeseeable attribute or decision on his part, the defendant must "take his victim as he finds him."[32]

(iii) that the injury inflicted by the defendant is still an "operating cause and a substantial cause"[33] of the victim's death. This principle is relied on in cases involving the intervention of medical treatment.

4.19 Against this background it becomes necessary to consider whether medical evidence can satisfactorily address questions of causation when death occurs after the year and a day period has elapsed. We have been unable to ascertain any reason connected with medical science why it should become more difficult to decide on the cause of death when the period of more than a year and a day has elapsed than when a period of say, 11 months has elapsed. It has not been suggested that a pathologist cannot ascertain the cause of death in such a case.[34] So far as we are aware, the absence of the rule has not caused any problems on this point in Scotland. We would welcome the views of any of our readers (especially from those medically qualified) on this question.

4.20 We appreciate that in many of these cases the reason why the victim does not die until more than a year and a day after the wrongful event is that he has been placed on a life support machine.[35] In that event, the immediate cause of death might well be the fact that the life support machinery was disconnected[36] but, nevertheless, the attitude of the

[31] For example, in *Pagett* (1983) 76 Cr App R 279 the court held that neither a reasonable act of self-defence, nor an act done in the execution of a legal duty to prevent crime or to arrest an offender, would break the chain of causation.

[32] *Blaue* [1975] 1 WLR 1411. The defendant stabbed the victim and pierced her lung. She refused a blood transfusion on religious grounds and died. The defendant was convicted of manslaughter and the Court of Appeal confirmed that although the refusal was not a natural consequence of the acts of the defendant, the victim's refusal of treatment did not break the chain of causation with the result that he had been rightly convicted.

[33] *Smith* [1959] 2 QB 35, 42 *per* Lord Parker CJ.

[34] This point was recognised by the New Zealand Crimes Consultative Committee in its 1991 Report. The Committee noted that the time limit was arbitrary and further that medical science has greatly reduced problems of causation: see Appendix B para 9.

[35] See for example the *Oxford Times* case discussed in para 4.4 above, when the victim was on a life support machine for nearly two and a half years before he died.

[36] This analysis of the situation is challenged by Ian Kennedy in *Treat me Right: Essays in Medical Law and Ethics* (1989) chap 18, "Switching Off Life-support machines: The Legal Implications". He believes that the crucial medical-legal decision is not switching off a ventilator, but rather switching it on, either initially or after having turned it off.

courts has been that the defendant would be liable provided that his act was a continuing, operating and substantial cause of the death.[37]

4.21 We now turn to the second aspect of the causation problem, namely whether the jury would be able to understand the medical evidence. Of course, it may by its very nature be of a highly technical nature. Yet it is difficult to see why this evidence is comprehensible to a jury if death occurs within a year and a day but incomprehensible outside that period.[38] Again we welcome the views of readers as to whether or not the type of evidence at issue in such cases would be too difficult for a jury to understand.

4.22 We are unaware of any other area in which it has been held that technical evidence is too difficult for a jury to comprehend. It is this Commission's experience that it is quite common for jurors to have to deal with technical matters concerning, for example, fingerprint or DNA evidence, evidence about the effect that drugs or drink may have had on the defendant, evidence of City Practice in fraud cases or the complexities of difficult financial transactions which might form the basis of a fraud prosecution.

4.23 More relevantly, in inquests coroners' juries[39] may have to consider complex evidence as to the cause of death.[40] After hearing evidence the jury must give their verdict and

[37] See *R v Malcherek* [1981] 1 WLR 690. The accused stabbed the victim nine times. She was admitted to hospital and after abdominal surgery to treat the wound she seemed to be making a good recovery. Five days later, she collapsed and her heart stopped beating for a period of 30 minutes. She was connected to a ventilator but her condition deteriorated and eventually the doctors turned off the life support machine. At the trial the judge withdrew the question of causation from the jury, ruling that there was no evidence on which they could find that the accused did not cause the victim's death. On appeal the accused argued that there was evidence which the jury should have been allowed to consider that it was the doctors who caused the death by turning off the machine. This argument was rejected.

[38] In a recent case reported in *The Times* 28 April 1994, Harold Golding was jailed for life for the murder of John Hughes, who died 11 months after being hit over the head by the accused. Mr Golding had previously been sentenced to eight years' imprisonment for causing grievous bodily harm. The victim appeared to have recovered from his injuries, but 11 months later suffered an epileptic seizure and died. It is extremely difficult to see how, if the seizure had been a month and a day later, this would have made it impossible for the jury to decide that the victim's death had been caused by the original injury: see also para 5.9 below.

[39] The most important provisions concerning the duties of coroners and rules relating to inquests are to be found in the Coroners Act 1988, which consolidates the main statutory provisions.

Section 8(3) of this Act provides that in a number of circumstances the coroner must summon a jury. Those circumstances are

(a) that the death occurred in prison;
(b) that the death occurred while the deceased was in police custody;
(c) that the death was caused by accident, poisoning or notifiable disease; or
(d) that the death occurred in circumstances that may be prejudicial to the health or safety of the public.

The coroner also has a general discretion, under s 8(4) to summon a jury in any other case if it appears that this is necessary.

[40] The Court of Appeal has recently stressed that this is to be read narrowly as requiring juries to decide only "by what means" the defendant met his death. See *R v Coroner for North Humberside and Scunthorpe ex parte Jamieson*, *The Times* 28 April 1994.

certify it by an inquisition.[41] This will entail an analysis of medical evidence in order to determine what, in medical terms, was the cause of death. There is, indeed, a power, under section 21(4) of the Coroners Act 1988, for the jury to require the coroner to order a post mortem if it is of the opinion that the cause of death has not been satisfactorily explained by the evidence of the witnesses brought before it. The 1988 Act makes it clear that it is not the coroner's or the jury's function to attempt to determine who is criminally or civilly liable for the death,[42] but there is no suggestion that the jury, as a fact finding body, may in some cases be unable to ascertain what, in medical terms, caused the death.

The contention that the rule does not work an injustice because the perpetrator might be convicted of an alternative serious offence

4.24 It will be recalled[43] that the CLRC in its 14th Report justified the continuation of the rule on the grounds that, inter alia:-

> "when death follows over a year after the infliction of injury the killer does not necessarily escape justice. He may be charged with attempted murder or causing grievous bodily harm with intent, both of which are punishable, and, if our recommendations are accepted, will continue to be punishable with life imprisonment".[44]

4.25 We now turn to examine the alternative offences which will be available at present if the rule prevents prosecution for a causing death offence. An alternative offence does exist in relation to all these offences apart from gross negligence manslaughter. The basic requirement for gross negligence manslaughter is that the death has been caused by the serious, or "gross" negligence of another.[45] With the exception of motor manslaughter cases,[46] there is usually no alternative offence with which a defendant can be charged, since the offences referred to in the Offences against the Person Act 1861 require an

[41] Coroners Act 1988, s 11(3)(a) and (5).

[42] Coroners Act 1988 s 11(6)

> At a coroner's inquest into the death of a person who came by his death by murder, manslaughter or infanticide, the purpose of the proceedings shall not include the finding of any person guilty of the murder, manslaughter or infanticide; and accordingly, a coroner's inquisition shall in no case charge a person with any of those offences.

This has been confirmed recently by the Court of Appeal in *R v Coroner for North Humberside and Scunthorpe ex parte Jamieson, The Times* 28 April 1994.

[43] See para 3.3 above.

[44] CLRC Fourteenth Report: Offences against the Person (1980) Cmnd 7844, para 39.

[45] See Involuntary Manslaughter, Consultation Paper No 135 Part III and in particular the analysis at paras 3.145-3.155.

[46] Ie where death is caused as a result of the use of a motor vehicle.

intention to cause physical harm to another or foresight of that result.[47] Similarly, intention is required for an attempt to commit any offence.[48]

4.26 These requirements will frequently not be satisfied in cases where death has been caused by a person's gross negligence. This means that prosecutions cannot be mounted where the victim dies more than a year and a day after the negligent act. Examples of wrongful acts which might fall into this category are the giving of grossly negligent medical treatment,[49] the defective rewiring of a house by an electrician,[50] or the provision of dangerous transport services by a company.[51] In such cases if the victim is kept on a life support machine for more than a year and a day the perpetrators of the relevant wrongful act would be able to evade liability. We believe that many of our readers will be dismayed by this state of affairs.

(i) Murder, and unlawful act and "voluntary" manslaughter

4.27 The main alternative offences to murder are attempted murder[52] or causing grievous bodily harm with or without intent.[53]

4.28 A person aged 21 or over convicted of murder is subject to a mandatory sentence of imprisonment for life.[54] Offenders under 18 at the time of the offence must be detained during Her Majesty's pleasure,[55] while for offenders aged 18 when the offence was committed and under 21 on date of conviction the sentence is custody for life.[56] Under section 1(2) of the Murder (Abolition of the Death Penalty) Act 1965, on sentencing any person convicted of murder to imprisonment for life, the court may recommend a minimum period which is to be served before the defendant may be considered for

[47] See JC Smith and B Hogan, *Criminal Law* (7th ed 1992) pp 426-428, and Offences against the Person and General Principles (1993) Law Com No 218, para 12.26: see Appendix A for the statutory provisions.

[48] Smith and Hogan (*op cit*) pp 304-308.

[49] See *Prentice* [1993] 3 WLR 927 and Involuntary Manslaughter, Consultation Paper No 135, paras 3.121-3.150.

[50] *Holloway* [1993] 3 WLR 927: see Consultation Paper No 135, paras 3.151-3.153.

[51] For example, *Stanley and others* 19 October 1990 (CCC) No 900160, in which a prosecution for manslaughter was instituted on the basis of the company and its officers being negligent in allowing the doors of a ferry to be left resulting in its capsize. The prosecution was dismissed for reasons with which this report is not concerned: see Consultation Paper No 135, para 4.31.

[52] See, for example, the Cambridge case. Because of the year and a day rule, the assailant was sent to prison for ten years for attempted murder and robbery: see para 1.7 above.

[53] See, for example, the Darlington case. The assailant was sentenced to two years imprisonment for causing grievous bodily harm: see paras 1.8 and 4.3 above.

[54] Murder (Abolition of Death Penalty) Act 1965 s 1(1) provides:
"No person shall suffer death for murder, and a person convicted of murder shall, subject to subsection (5) below, be sentenced to imprisonment for life."

[55] Children and Young Persons Act 1933 s 53(1).

[56] Criminal Justice Act 1982 s 8(1).

release. In *Flemming*,[57] the Court of Appeal observed, obiter, that no such recommendation should be for less than twelve years. However, it has been questioned whether it was indeed the intention of Parliament that the power could be used only to mark the most heinous of murders.[58]

4.29 It is instructive to ascertain how long murderers actually spend in prison. The average length of time served by murderers who have been released over the last five years has gradually been increasing. The position can be summarised as follows:[59]

YEAR OF RELEASE	AVERAGE TIME SERVED (YEARS)
1988	10.1
1989	11.6
1990	12.2
1991	12.2
1992	12.5 *(provisional figure)*

4.30 The first alternative offence to murder is attempted murder, for which the maximum sentence is life imprisonment.[60] Lord Lane CJ has stated[61] that in general, where a life sentence is discretionary, it should be reserved for those cases where a characteristic of the defendant cannot be determined at the time of sentencing. This will usually mean the presence of some mental condition which makes it impossible for a judge to determine when sentence is passed for how long the defendant will pose a risk to the general public. Where no such factor exists and the only aims of the sentence are punishment and deterrence, an indeterminate sentence will usually be inappropriate.

4.31 Cases of attempted murder, and the resulting sentences, cover a wide range. For example, at one end of the spectrum, three men who carefully planned the murder of a foreign ambassador and subsequently shot him in the head, causing severe injuries, were sentenced to 30 and 35 years' imprisonment for attempted murder.[62] It is interesting

[57] (1973) 57 Cr App R 524.

[58] See *Archbold Criminal Pleading, Evidence and Practice* (1994) vol 2 para 19-87a, where it is suggested that the provision should also be used to indicate cases which demand leniency.

[59] See Written Answer *Hansard* (HL) 25 January 1994, vol 551, col WA72.

[60] Murder (Abolition of Death Penalty) Act 1965 s 1(1) and Criminal Attempts Act 1981 s 4(1)(a).

[61] *Basra* (1989) 11 Cr App R (S) 527, a case of conspiracy to murder and aiding and abetting murder. Sentences of life imprisonment were varied to 35 years.

[62] *Al-Banna* (1984) 6 Cr App R (S) 426.

to note, however, that of the 50 defendants convicted of attempted murder in 1992, six were given life sentences, and 31 received determinate custodial sentences whose average length was seven and a half years.[63] It must also be borne in mind that of the average sentence of seven and a half years, between one third and one half[64] may be served on release from custody on licence. This means that the average length of time actually spent in prison by someone given a determinate sentence for attempted murder in 1992 will be between three years and nine months and five years. Our readers will be able to compare these figures with the figures set out in paragraph 4.29 above for murder sentences.

4.32 It will be recalled that the CLRC[65] indicated that a conviction for causing grievous bodily harm with intent, contrary to section 18 of the Offences against the Person Act 1861,[66] might result:- an appropriate punishment for somebody who avoids conviction for murder because of the existence of the rule. The range of sentences passed for this offence is extremely wide. Of the 1512 defendants convicted in 1992, seven were given life sentences. 1156 received determinate custodial sentences whose average length was three years.[67] Needless to say, if the harm inflicted is so serious that death ultimately results from it, a sentence much higher than the average might be expected in most cases.

4.33 The other offence which has to be considered is the offence of unlawfully inflicting grievous bodily harm contrary to section 20 of the Offences against the Person Act 1861,[68] for which the maximum sentence is five years. The harsher sentences tend to be imposed in those cases where a weapon was used. Home Office statistics[69] show that of the 3674 defendants convicted of this offence in 1992, 1656 received custodial sentences whose average length was 1.25 years.

4.34 So far as "voluntary" and "unlawful act" or "gross negligence" manslaughter are concerned, they all carry a maximum sentence of life imprisonment.[70] Heavier sentences tend to be imposed for manslaughter by stabbing. Thus where the victim was

[63] Official Home Office statistics (1992).

[64] Criminal Justice Act 1991, s 33(2) provides:
"As soon as a long term prisoner has served two-thirds of his sentence, it shall be the duty of the Secretary of State to release him on licence"

and s 35(1) provides:
"After a long-term prisoner has served one-half of his sentence, the Secretary of State may, if recommended to do so by the Board, release him on licence."

[65] See para 3.3 above.

[66] See Appendix A.

[67] Official Home Office statistics (1992).

[68] See Appendix A.

[69] See n 63 to para 4.31 and n 67 to para 4.32 above.

[70] The actual sentences imposed vary enormously.

stabbed after an argument in which there was minimal provocation, a sentence of seven years' imprisonment was imposed.[71] On the other hand, where a defendant was convicted of reckless manslaughter after his shotgun had discharged while he was cleaning it, a sentence of two years' imprisonment was thought appropriate.[72] Home Office statistics[73] show that of the 286 defendants convicted of manslaughter (both voluntary and involuntary) in 1992, 14 were given a life sentence. 201 were given a determinate custodial sentence, and the average length of these sentences was 4.8 years.

4.35 It will therefore be seen that there are very substantial variations in sentences for these offences. Our readers will be able to form their own view on the question whether the sentences imposed for attempted murder or for the different forms of assault are adequate substitutes for those which would have been imposed for murder or manslaughter but for the operation of the rule.

(ii) Aiding and abetting suicide[74]

4.36 The maximum sentence available for this offence is 14 years' imprisonment.[75] Nevertheless the range of circumstances in which the offence may be committed is clearly vast:

> "in terms of gravity [the offences of attempted murder and aiding and abetting suicide] can vary from the borders of cold-blooded murder down to the shadowy area of mercy killing or common humanity."[76]

4.37 This is reflected in the range of sentences imposed. In *Hough*[77] a sentence of nine months' imprisonment was imposed on a woman aged 60 who had assisted in the suicide of a woman aged 84 by giving her sodium amytal tablets.[78] On the other hand, in *McGranaghan*[79] a sentence of eight years' imprisonment was upheld for aiding and abetting an attempted suicide where a prisoner with a long criminal record had persuaded his cell mate to attempt to commit suicide. The defendant made a noose and then helped the deceased, who was physically disabled, to climb onto a cupboard from which he fell,

[71] *Whitmore* (1989) 11 Cr App R (S) 288.

[72] *Wesson* (1989) 11 Cr App R (S) 161.

[73] Official Home Office statistics (1992).

[74] See Appendix A.

[75] Suicide Act 1961 s 2: see Appendix A.

[76] *Hough* (1984) 6 Cr App R(S) 406, 409 *per* Lord Lane CJ.

[77] *Ibid.*

[78] Although the defendant in this case had pleaded guilty to attempted murder, Lord Lane CJ stressed that what she did fell to a great extent within the terms of s 2 of the Suicide Act 1961 (see Appendix A) and implied that a similar sentence would have been imposed for that offence.

[79] (1987) 9 Cr App R (S) 447.

strangling himself. Home Office statistics[80] show that the average sentence imposed for aiding and abetting suicide, in 1992, was two years' imprisonment, but there are insufficient cases each year to enable us to identify a settled sentencing pattern, either for this offence or for the offence of attempt to aid and abet suicide, to which we now turn.

4.38 If, by reason of the year and a day rule, it is not possible to prosecute somebody for aiding and abetting suicide,[81] then there is the possibility of prosecuting him for attempting to aid and abet suicide,[82] which carries a maximum sentence of 14 years imprisonment.[83] There is no reliable set of statistics for sentencing for this offence but it is interesting that in *McShane*,[84] where the defendant had slipped her ageing mother some nembutal tablets and discussed suicide with her whilst she was convalescing in a retreat, a sentence of two years' imprisonment was upheld by the Court of Appeal.

(iii) Driving offences

4.39 As we observed in paragraph 2.14 above, it seems quite likely that the year and a day rule applies to the statutory offences of causing death by dangerous driving contrary to section 1 of the Road Traffic Act 1988 and of causing death by careless driving when under the influence of drink or drugs under section 3A of the same Act.[85] The maximum sentences for both these offences are ten years' imprisonment,[86] and the Court of Appeal has recently held[87] that in bad cases drivers convicted of either offence should be imprisoned for upwards of five years, and that in the very worst cases, if contested, sentences should be in the higher range of the permitted maxima. Only exceptionally would a non-custodial sentence be appropriate. It is equally likely that the rule applies to the offence of aggravated vehicle-taking causing death, contrary to section 12A(1)(b) of the Theft Act 1968, for which the maximum sentence is five years.[88]

[80] Official Home Office statistics (1992).

[81] See *R v Inner London Coroner ex parte De Luca* [1989] QB 249, 253 *per* Bingham LJ. However, it is arguable that the offender could still be convicted of aiding and abetting *attempted* suicide, even if the victim dies more and a year and a day after the act which caused death: see n 23 to para 2.11 above.

[82] Because aiding and abetting forms the principal offence, s 1(4)(b) of the Criminal Attempts Act 1981, which makes it clear that it is not an offence to attempt to aid, abet, counsel or procure the commission of an offence, does not apply.

[83] Suicide Act 1961, s 2(1) and Criminal Attempts Act 1981, s 4(1)(b).

[84] (1977) 66 Cr App R 97.

[85] See Appendix A. Of course, as we observed in para 2.8 above, the rule also applies to manslaughter which can also be charged where death is caused by very bad driving: *Seymour* [1983] 2 AC 493. For our proposals in connection with motor manslaughter see Consultation Paper No 135 paras 5.22-5.29.

[86] Criminal Justice Act 1993, s 67.

[87] *Shepherd* [1994] 1 WLR 530, 536 *per* Lord Taylor CJ.

[88] See Appendix A, particularly Theft Act 1968, s 12A(4).

4.40 If prosecution for one of these statutory motor manslaughter offences is not possible because of the operation of the rule, the alternatives left open to the prosecution are the offences of dangerous driving contrary to section 2 of the Road Traffic Act 1988;[89] careless driving contrary to section 3 of the Act;[90] driving while unfit to drive through drink or drugs or with an alcohol concentration above the prescribed limit, contrary to sections 4 and 5 of the Act respectively;[91] and aggravated vehicle taking contrary to section 12A of the Theft Act 1968.[92]

4.41 The maximum sentence for dangerous driving is two years' imprisonment and a fine. Because the offence of dangerous driving is relatively new, no clear sentencing guidelines have been laid down yet. However, sentencing for the old offence of reckless driving under section 1(1) of the Road Traffic Act 1972 (which the new offence of dangerous driving replaced) is likely to give an indication of what can be expected for the new offence. What is apparent from these cases is the difference between the type of sentence which can be expected for causing death[93] - five years and upwards in serious cases - and those which are usually imposed for the basic, non-fatal, offence.

4.42 For example, in *Singh Sandhu*,[94] the appellant and X were racing at high speed on a road subject to a 40 mph speed limit. X was involved in a collision in which a pedestrian was killed, and was sentenced to two years' imprisonment for causing death by reckless driving. By contrast, the appellant's sentence of nine months' imprisonment was upheld by the Court of Appeal. Similarly, in *Staddon*,[95] another very serious case of reckless driving in which the appellant came very close to causing death, Cresswell J in the Court of Appeal substituted a sentence of 18 months for the original sentence of two years, in view of the appellant's guilty plea. He said:

> "The appellant came as near to killing two people as he could have done. It is important, however, to bear in mind that Parliament has drawn a distinction between the offence of reckless driving, which carries a maximum of two years' imprisonment, and the offence of causing death by reckless driving, which carries a maximum of five years' imprisonment."

4.43 Of course, since the maximum sentence for the new offence of causing death by dangerous driving has been increased from five to ten years, without any corresponding

[89] See para 4.41 and Appendix A below.

[90] See para 4.44 and Appendix A below.

[91] See para 4.44 and Appendix A below.

[92] See para 4.44 and Appendix A below.

[93] For which see the Court of Appeal's guidelines in *Shepherd*: see para 4.39 above.

[94] (1987) 9 Cr App R (S) 540.

[95] (1991) 13 Cr App R (S) 171, 173.

increase in the maximum sentence for dangerous driving simpliciter, the contrast between the types of sentence passed for the two offences will become even more marked.

4.44 The other Road Traffic Act offences with which a person could be charged where the rule applies, referred to in paragraph 4.40 above,[96] are triable summarily only, and have maximum sentences ranging from six months' imprisonment for the most serious form of the section 4 offence, to a fine of £2,500 for careless driving;[97] and the maximum sentence for non-fatal aggravated vehicle taking is two years.[98]

4.45 The contrast between the maximum sentences available for the statutory driving offences involving the causing of death and the other non-fatal driving offences is striking. It is apparent that the operation of the rule in cases where a driver has caused death but the victim dies more than a year and a day after the incident may lead to the imposition of wholly inadequate sentences, particularly where there has been no dangerous driving or aggravated vehicle taking, but where the accused has consumed drink or drugs prior to driving.

[96] See Appendix A.

[97] See the Road Traffic Offenders Act 1988, s 9 and Sch 2.

[98] In *Bird* (1992) 14 Cr App R (S) 343 the Court of Appeal, in a case of aggravated vehicle-taking where the driving had been extremely dangerous, observed that a sentence of 15 months was not excessive.

PART V

POSSIBLE PROBLEMS CAUSED BY ABOLITION OF THE RULE AND SAFEGUARDS FOR THE DEFENDANT

Introduction

5.1 In this Part, we consider the problems that might arise if the rule were to be repealed. In those circumstances a defendant could be prosecuted in the first place for some offence other than a homicide offence such as murder or manslaughter, and later, after the death of the victim, he could be prosecuted for a homicide offence in separate proceedings initiated perhaps some years after the assault. We consider, first, whether this would place the defendant under double jeopardy,[1] so as to prevent the second prosecution for murder or manslaughter; and secondly, if not, whether the second prosecution would or might constitute an abuse of the process of the court.[2] We consider whether the Code for Crown Prosecutors provides an adequate safeguard for a defendant by preventing stale prosecutions,[3] and, finally, we consider the question of limitation periods on criminal prosecutions.[4]

Double jeopardy: The problems of autrefois acquit and autrefois convict

5.2 The year and a day rule will only apply in cases where there has been a delay between the infliction of the original injury and the death of the victim. If the accused has already been charged and convicted of an offence in connection with the initial infliction of injury before the victim dies, the question arises whether he should be charged again with a homicide offence. In the most frequent examples of this type the accused will have been prosecuted for assault occasioning actual bodily harm,[5] wounding or causing grievous bodily harm with or without intent,[6] or attempted murder.[7] If he is then charged with murder or manslaughter after the death of the victim (under the present rule this would only be possible if less than a year and a day had elapsed since the original injury) it might be thought that he was being tried twice for the same offence.

5.3 The usual tests for determining the validity of the pleas in bar of autrefois acquit and autrefois convict are whether the accused had previously been acquitted or convicted of the same, or a substantially similar, offence; and whether he could have been convicted at the first trial of the offence with which he is charged at the second.

[1] See paras 5.2-5.11 below.

[2] See paras 5.12-5.30 below.

[3] See paras 5.31-5.34 below.

[4] See paras 5.35-5.37 below.

[5] Offences against the Person Act 1861, s 47: see Appendix A.

[6] Offences against the Person Act 1861, ss 18 and 20: see Appendix A.

[7] See para 4.30 above.

5.4 An acquittal or conviction for an offence of violence not involving the death of the victim has been held not to bar the subsequent prosecution of the accused for murder or manslaughter after the victim has died.[8] This rule was discussed at some length by the Court of Criminal Appeal in *Thomas*.[9] In May 1949 the appellant was convicted of having, on 20 March 1949, feloniously wounded his wife with intent to murder her, and was sentenced to seven years penal servitude. She died a month after the trial as the result of the wounds she had received. In a second trial the appellant was convicted of her murder. He appealed on the ground that the plea of autrefois convict had been wrongly rejected. Humphreys J delivered the judgment of the court[10] dismissing the appeal.

5.5 After describing how the conviction for murder had arisen,[11] he then went on to address the "narrow" issue of autrefois convict:

> "The offence or crime of murder consists in the felonious killing of another with malice. It is plain that on 2 May [when the accused was convicted of wounding with intent] the accused was not convicted of that offence, nor of anything which is substantially the same offence or crime as that charged in the indictment, nor could he have been, since his wife was then alive. It follows that the plea of autrefois convict in the strict sense of the term is bound to fail, and does fail."[12]

5.6 However, that was not the end of the matter because the appellant had also relied on an argument which was based on the more general principle that "no one ought to be twice punished for one offence". The strongest case in his favour was *Miles*.[13] In this case the accused had entered a plea in bar in which he alleged that the assault for which he had been convicted previously and the wounding and battery in the current indictment were one and the same assault and battery. The Court for the consideration of Crown Cases Reserved upheld the appellant's plea. All the judges considered that both the plea and the evidence showed that the accused had only committed one offence. However, Hawkins J,[14] who gave the first judgment, observed that *not every* summary conviction or acquittal for common assault would operate as a bar to an indictment for an offence in which that assault was an element. He gave murder as an example. This, he said, depended on felonious "killing". In *Thomas* Humphreys J noted that:

[8] *Phipson on Evidence* (14th ed 1990), p 897.

[9] [1950] 1 KB 26.

[10] The court consisted of Humphreys, Hilbery and Croom-Johnson JJ.

[11] [1950] 1 KB 26, 28.

[12] *Ibid*, p 29.

[13] (1890) 24 QBD 423.

[14] *Ibid*, p 433.

> "In our judgment, that observation applies with equal force to the present case, and is sufficient to dispose of this case so far as it depends on autrefois convict".[15]

5.7 Humphreys J then stressed that it had never been the law that a person should not be punished twice for the same act. Section 33 of the Interpretation Act 1889 made this clear by a reference to being punished twice for the same "offence", and this point had been expressly decided as far back as 1867 in *Morris*[16] by the Court of Criminal Appeal. In *Thomas* Humphreys J quoted from the headnote of that case:

> "A previous summary conviction for an assault under the Act is not a bar to an indictment for manslaughter of the party assaulted, founded upon the same facts".[17]

5.8 Humphreys J then dealt with a point raised by the appellant that it might be possible to find him not guilty of murder but guilty of the lesser offence of which he had already been convicted. First, he observed that no one had hitherto suggested that there was either a statutory or common law rule enabling a jury on a charge of murder to find that the accused had been guilty of wounding with intent.[18] Even assuming that such an alternative verdict was possible, the case of *Tonks*[19] showed that any problem could be avoided by the judge telling the jury that it must, having regard to the special facts of the case, either come to the conclusion that the accused was guilty of manslaughter or return a verdict of acquittal.

5.9 It is therefore well established that a previous conviction for an assault offence is no bar to a later conviction for murder or manslaughter if the victim subsequently dies. A recent example is the case of Harold Golding who was sentenced to eight years imprisonment for causing grievous bodily harm with intent, and was later charged and convicted of murder when the victim of his attack died, 11 months after the original assault.[20]

5.10 It is also clear that where a subsequent prosecution is brought, for example for murder, in which the same facts are in issue as were in issue in an earlier prosecution, for example for attempted murder, it will be necessary to prove each and every fact de novo. In other words, the prosecution cannot rely on an earlier decision by a fact-finding body.

[15] [1950] 1 KB 26, 30-31.

[16] (1867) 10 Cox CC 480.

[17] [1950] 1 KB 26, 32.

[18] The law has now been changed by statute: see Criminal Law Act 1967 s 6(2)(a).

[19] [1916] 2 KB 443.

[20] Golding's accomplice, Alan Emmett, had also been convicted of grievous bodily harm, and was convicted of manslaughter at the second trial: *The Times* 28 April 1994. See para 4.21 n 38 above.

In *Hogan*,[21] the doctrine of issue estoppel was introduced for a short time into English law, with the effect that the prosecution could then rely on a previous conviction arising from the same facts. However, this decision was overruled in *DPP v Humphreys*[22] when the House of Lords unanimously declared that issue estoppel did not apply in English criminal proceedings.

The effect of a previous conviction for attempted murder on a further conviction for murder

5.11 The cases discussed in paragraphs 5.2-5.9 above were concerned with a previous conviction for an assault offence and did not directly raise the issue of a conviction for attempted murder, which was followed by the death of the victim within a year and a day and by a later charge of murder. Smith and Hogan,[23] however, when discussing the principle that a successful attempt can still be charged as an attempt rather than as the completed offence, see no problem with such an outcome:

> "As a matter of principle, this seems right. At a certain point in the transaction, D is guilty of an attempt. The attempt may fail for many reasons, or it may succeed. There is no reason why, if it succeeds, it should cease to be the offence of attempt which, until that moment, it was. The greater includes the less. If D is convicted of attempted murder while his victim, P, is alive and P then dies of injuries inflicted by D, D is now liable to be convicted of murder; but the conviction for attempt is not invalidated. It would, of course, be improper to convict D of both attempt and the full offence at the same time. To that extent, the attempt merges in the completed offence".

Abuse of Process

5.12 In *Connelly v DPP*[24] Lord Devlin said that the general power of a court to stay proceedings where they constitute an abuse of process should be added to the list of grounds on which the court may refuse to allow an indictment to go for trial.[25] While the five speeches in *Connelly* differed in detail, all affirmed the principle that the court has a general and inherent power to protect its process from abuse. The three members

[21] [1974] QB 398.

[22] [1977] AC 1.

[23] JC Smith and B Hogan, *Criminal Law* (7th ed 1992) p 314.

[24] [1964] AC 1254.

[25] [1964] AC 1254, 1347. The other grounds on which the court could refuse to arraign the accused once an indictment was before the court were: (i) on a motion to quash or demurrer pleaded it was held defective in substance or form; (ii) matter in bar was pleaded and the plea was tried or confirmed in favour of the accused; (iii) a *nolle prosequi* was entered by the Attorney-General, which could not be done before the indictment is found; or (iv) the indictment disclosed an offence which a particular court had no jurisdiction to try: see *Archbold Criminal Pleading Evidence and Practice* (1993), para 4-40.

of the House of Lords in *DPP v Humphreys*[26] who addressed the issue also confirmed the existence of this general power, although they again differed as to its precise scope. Since then, a number of cases have established that magistrates have a similar power.[27]

5.13 The court's inherent power to grant a stay on the grounds of abuse of process may be relevant in two respects in cases where the victim of an assault dies after a considerable delay. First, if the year and a day rule was abolished and cases could therefore be brought after a substantial period of time had elapsed between the injury being inflicted and death, the issue of abuse on the ground of delay might be raised more frequently than it is at present.[28] Secondly, it is possible that the accused might already have been tried for a non-fatal offence resulting from the original incident, and that it would constitute an abuse of process to charge him later with a more serious offence following the victim's death. This ground resembles the pleas of autrefois convict and autrefois acquit,[29] except that those bars are rules of court,[30] as opposed to matters on which the court may exercise its inherent discretion to grant a stay for abuse of process. This discretion is more flexible than the narrow rules of autrefois convict or acquit.

5.14 The burden of establishing that the pursuit of particular proceedings would amount to an abuse of process will normally fall on the accused, and the standard of proof is the balance of probabilities.[31]

Abuse of process on grounds of delay

5.15 The most common basis on which the exercise of the discretion to stay proceedings for abuse of process is sought is that of delay.[32] Such an application is characteristically made in cases where substantial delay has been caused either by a deliberate act by the prosecution or by inefficiency on its part. In such a case, if the defendant is shown to have suffered prejudice as a result of the delay or even if such prejudice is inferred from the fact of delay, the court may exercise its jurisdiction and stay the case.

5.16 It might be an abuse of process if either (a) the prosecution has manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the

[26] [1977] AC 1, *per* Viscount Dilhorne pp 23-24, Salmon LJ p 46 and Edmund-Davies LJ p 53.

[27] See *Archbold Criminal Pleading, Evidence and Practice* (1993), para 4-43.

[28] Of course, even with the rule in place, there may still be considerable delay between the death and the institution of proceedings.

[29] Discussed in paras 5.2-5.11 above.

[30] Criminal Justice Act 1988 s 122 provides that when an accused pleads autrefois acquit or autrefois convict it shall be for the judge, without the presence of a jury, to decide the issue.

[31] *R v Telford Justices ex parte Badhan* (1991) 93 Cr App R 171; *R v Crown Court at Norwich ex parte Belsham* (1992) 94 Cr App R 382; and *R v Great Yarmouth Magistrates ex parte Thomas and others* [1992] Crim LR 116.

[32] See *Archbold Criminal Pleading, Evidence and Practice* (1993) at paras 4-44e-4-45; and note that this was a point considered of importance in the CPS evidence to the Nathan Committee, for which see para 3.7 above.

law, or so as to take unfair advantage of a technicality, or (b) on the balance of probability, the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by unjustifiable delay on the part of the prosecution.[33] Examples of justifiable delays which will not normally constitute an abuse of process are cases where delay has arisen from the complexity of the enquiry and preparation of the prosecution case; or where delay has been caused by the action of the defendant or of a co-accused; or where there has been a genuine difficulty in effecting service.

5.17 In most cases which are at present subject to the rule, the prosecution will in no real sense be responsible for the delay in proceedings. However, a lapse of time for which the prosecuting authority is not to blame may still be such that a fair trial is impossible. The test that has now been established is not whether the delay by a complainant in making a complaint was justifiable, but whether a fair trial would be possible in view of the delay.[34] The court, therefore, is not precluded from exercising its discretion to grant a stay merely because the prosecution is not to blame for the delay. However, delay for which the accused himself is responsible cannot justify a stay.[35] If the year and a day rule were to be abolished,[36] one would need to consider a case where there was a long delay between the infliction of injury and the victim's death, which in turn meant that proceedings for murder or manslaughter could not be initiated until a long time after the incident which caused death. It is possible in those circumstances that the court would decline to find that this delay meant that the new proceedings would constitute an abuse of process. It could be argued, for instance, first, that the offence was not completed until the victim's death, and, therefore, that there was no delay in bringing the prosecution; or, alternatively, that the accused was responsible for the fact that the victim took a considerable time to die following the original assault, and therefore for the delay in commencing proceedings.[37] However, in each case it would be for the court to decide whether the delay, if any, would be prejudicial to the accused, and whether a stay should be imposed, and in so doing it would be guided by the principles set out below.

5.18 The principles to be applied in cases where there has been a delay in bringing a prosecution were discussed at some length in *Attorney-General's Reference (No 1 of 1990)*.[38] A police officer was tried for assault over two years after an incident and he submitted that in view of the delay the proceedings constituted an abuse of the process

[33] *Archbold Criminal Pleading Evidence and Practice* (1993) para 4-45.

[34] *R v Telford Justices ex parte Badhan* (1991) 93 Cr App R 171.

[35] *R v Crown Court at Norwich ex parte Belsham* (1992) 94 Cr App R 382, *Attorney-General's Reference (No 1 of 1990)* [1992] 1 QB 630.

[36] This is option 6, our preferred option, which we set out for the consideration of readers in paras 6.18-6.24 below.

[37] We have been unable to find any case which indicates how the court would exercise its jurisdiction if there was a very long interval between the wrongful act and the death.

[38] [1992] 1 QB 630.

of the court. The trial judge held on the balance of probabilities that although the delay was not unjustified,[39] it might be prejudicial to the defendant, and he ordered the proceedings to be stayed. The prosecution offered no evidence and, by direction, a verdict of not guilty was recorded. The Attorney-General referred two questions to the Court of Appeal. The first was whether proceedings upon indictment could be stayed on the grounds of prejudice resulting from delay in the institution of those proceedings, even though that delay had not been occasioned by any fault on the part of the prosecution. If the answer to this question was "yes", the other question related to the degree of likelihood and seriousness of prejudice which was required to justify a stay of such proceedings. The Court of Appeal held (1) that a stay for delay was to be imposed only in *exceptional* circumstances; that, even where delay could be said to be unjustifiable, the imposition of a permanent stay was to be the exception rather than the rule; and that even more rarely could a stay properly be imposed in the absence of fault on the part of the complainant or the prosecution, and never where the delay was due merely to the complexity of the case or was contributed to by the defendant's actions; and (2) that no stay was to be imposed unless a defendant established on the balance of probabilities that, owing to the delay, he would suffer *serious prejudice* to the extent that no fair trial could be held.

5.19 The judge's decision to grant a stay had, therefore, been wrong, since such delay as there had been was not unjustifiable, the chances of prejudice were remote, the degree of potential prejudice was small, the powers of the judge and the trial process itself would have provided ample protection for the police officer, there was no danger of the trial being unfair and in any event the case was not so exceptional as to justify the ruling. Although the court ruled that in principle the court could exercise its discretion to stay proceedings in a case where delay was due solely to the circumstances and not due to any fault on the part of the prosecution, it stressed that where delay was not the fault of the prosecuting authorities, a stay should be granted only in the most exceptional of circumstances.[40]

5.20 While there is a power available, therefore, to prevent real injustice in an extreme case, this power will be exercised very sparingly. In some cases even a very long delay has been held not to justify a stay of the proceedings.[41]

[39] The complaint against the police officer had been adjourned pending the outcome of the criminal proceedings against those he had arrested during the incident.

[40] The Privy Council in *George Tan Soon Gin v Judge Cameron* [1992] 2 AC 205 confirmed that the court's discretionary jurisdiction to stay criminal proceedings should be exercised very sparingly, and that the burden of proving that exceptional circumstances warrant a stay remained on the defendant even after a long delay.

[41] For example in *R v Central Criminal Court ex parte Randle and Pottle* (1991) 92 Cr App R 323, a delay of 20 years was held not to amount to an abuse of process. The two defendants were prosecuted for assisting a spy to escape. The charges were brought following the publication of a book written by the two defendants describing their part in the escape. In the event a jury at the Old Bailey later acquitted them, *The Times* 27 March 1991.

Abuse of process and double jeopardy

5.21 The court also has a discretion to stay a prosecution for an offence which is based on the same facts as a lesser offence in respect of which the defendant has already been acquitted or convicted.[42]

5.22 In *R v Forest of Dean Justices ex parte Farley*,[43] the Divisional Court confirmed that there is a discretion to stay proceedings if to proceed after conviction or acquittal on a lesser charge would be oppressive or prejudicial; however, the court stressed that there will be few cases where it is appropriate for the court to intervene in the prosecution process in this way.

5.23 In *Griffiths*,[44] the plea of autrefois acquit failed because the second offence was not the same or substantially the same as the offence for which the defendant had been previously acquitted.[45] However, the pleas of "double jeopardy" and abuse of process were well founded in that the Crown was seeking to reopen an earlier decision which had resulted in D's acquittal.

5.24 These cases show that the principles which underpin the power to grant a stay on the grounds of abuse of process are wider than the rules governing the pleas of autrefois convict and acquit, although the discretion should only be exercised in **exceptional** circumstances. The relationship between these two concepts was considered in some detail by Professor Sir John Smith in his commentary to the decision in *Moxon-Tritsch*.[46] The defendant had pleaded guilty to charges of driving without due care and attention and driving with excess alcohol in her blood. The parents of one of the children killed in the incident then instituted a private prosecution for causing death by reckless driving. The defence pleaded autrefois convict and, alternatively, that the court had an inherent jurisdiction to stay the proceedings because the private prosecution arose out of the same facts. The trial judge held, applying the principle established in *Connelly v DPP*,[47] that it was a fundamental principle of English criminal law that no one should be twice put in jeopardy of conviction and punishment for the same offence arising out of the same set of facts. He ruled that the proposed prosecution arose from the same facts as those upon which the defendant had been convicted at the magistrates' court. It would be

[42] See *Archbold Criminal Pleading, Evidence and Practice* (1993) para 4-44c; *Moxon Tritsch* [1988] Crim LR 46, considered in *R v Forest of Dean Justices ex parte Farley* [1990] Crim LR 568; and see also *Griffiths* [1990] Crim LR 181.

[43] [1990] Crim LR 568.

[44] [1990] Crim LR 181.

[45] See paras 5.2-5.11 above. The defendant was charged with conspiracy to import cocaine having previously been acquitted of conspiracy to supply cocaine and possession of cocaine with intent to supply. The only fact that linked the defendant to cocaine in the second indictment was her connection with the cocaine that was the subject of the first trial.

[46] [1988] Crim LR 46.

[47] [1964] AC 1254: see para 5.12 above.

oppressive to let her face a second trial for a more aggravated form of the same offence to which she had already pleaded guilty, since, as the judge put it, "her ordeal must be brought to an end". Accordingly he ruled in his inherent jurisdiction that it would be an abuse of the process of the court to allow the private prosecution to continue.

5.25 In his commentary,[48] Sir John Smith observed that the prime example of double jeopardy is the case where the present charge, if allowed to proceed, might result in conviction of the defendant of an offence of which he (i) has been convicted or acquitted, or (ii) has been "in peril" of conviction at earlier proceedings. This present law is reflected in clause 15 of the Code Team's Draft Criminal Code:[49]

> 15 (1) A person shall not be tried for an offence-
> (a) of which he has been convicted or acquitted;
> (b) of which he might (on sufficient evidence being adduced) have been convicted on an indictment or information charging him with another offence of which he has been convicted or acquitted...

5.26 The facts in *Moxon-Tritsch* did not come within this narrow principle. Clause 15 of the Draft Code goes on, however, to extend the rule against double jeopardy[50] by providing that a person shall not be tried for an offence:

> (c) when the allegations in the indictment or information include expressly or by implication all the elements of an offence-
> (i) of which he has been acquitted; or
> (ii) of which he might (on sufficient evidence being adduced) have been convicted on an indictment or information charging him with another offence of which he has been acquitted;
> (d) when the allegations in the indictment or information include expressly or by implication all the elements of an offence-
> (i) of which he has been convicted; or
> (ii) of which he might (on sufficient evidence being adduced) have been convicted on an indictment or information charging him with another offence of which he has been convicted,

[48] [1988] Crim LR 46, 47.

[49] Codification of the Criminal Law, A Report to the Law Commission, (1985) Law Com No 143. This was a report drafted by a group of academic lawyers chaired by Professor Sir John Smith which was submitted to this Commission as a further stage towards the codification of the criminal law. Clause 15 of the proposed code, which deals with double jeopardy, was intended to replace the common law special pleas in bar of autrefois acquit and autrefois convict and associated rules. In our own report, A Criminal Code for England and Wales (1989) Law Com No 177, this Commission substantially repeats the Code Team's approach to double jeopardy in paras 5.24-5.36 and in clause 11 of its draft Code.

[50] The scope of the rules of autrefois convict and autrefois acquit in the present law is unclear, see para 5.28 below. However, the Code Team concluded that the balance of authority favoured a wide interpretation of the rule and that the broad formulation of the principle in the draft code was also right in principle.

except where an element of the offence presently charged is alleged to have occurred after the day of conviction...

5.27 Sir John Smith[51] considered that the facts of *Moxon-Tritsch* would come within (d)(i) because the charge of causing death by reckless driving included by implication all the elements of the offence of careless driving of which the defendant had been convicted.

5.28 The precise scope of the narrow rules of autrefois convict or autrefois acquit in the present law is somewhat unclear. In *Connelly* Lord Devlin[52] seems to have been of the opinion that the rule of law against double jeopardy was confined to the rules in (a) and (b) above, and that cases within (c) and (d) would be left to the discretion of the court. Earlier decisions, however, apply the rule of law in circumstances (c) and (d) and these seem to have been approved by Lord Morris of Borth-y-Gest, Lord Hodson and probably Lord Pearce.[53] Whether or not, however, there is a rule of law, the judge has a discretion to stay the proceedings if they are vexatious. Clause 15(6) of the Draft Criminal Code would preserve that discretion.[54]

5.29 It would appear, therefore, that where a defendant has been convicted or acquitted of an offence such as causing grievous bodily harm, and is then charged with murder, the case would come under (c) or (d) and the trial should be stayed, either on the grounds of double jeopardy or as an abuse of the process of the court. However, as is reflected in the Draft Code, special considerations might apply in cases where the circumstances have changed since the first trial. The exception to Clause 15(1) para (d) in the Draft Code would, for example, allow the trial for causing death by dangerous driving of a person who had been convicted (but not one who had been acquitted) of dangerous driving, if the death occurred after the date of conviction.

5.30 This exception would appear to permit subsequent convictions for murder or manslaughter, following a conviction for, but not an acquittal of, a lesser offence, provided the victim dies after the first trial. This, indeed, is the example given by the Code Team in its discussion of Clause 15:

[51] [1988] Crim LR 46, 48.

[52] [1964] AC 1254, 1358.

[53] *Ibid*, pp 1315-1318, 1332.

[54] Codification of the Criminal Law, A Report to the Law Commission, (1985), Law Com No 143, clause 15(6):
"Nothing in this section shall limit any power of a court to stay the proceedings on the ground that they constitute an abuse of the process of the court."

"If...the defendant has been convicted of causing serious injury to P and P thereafter dies, it is established law (and right in principle) that the defendant may properly be charged with homicide".[55]

The Code for Crown Prosecutors

5.31 In the preceding paragraphs we have discussed the processes by which a prosecution which is unjust or prejudicial to a defendant may be discontinued by the court. Another safeguard for the defendant comes into play at an earlier stage, however, when the prosecuting authorities decide whether to bring a prosecution in the first place. The exercise of this discretion is governed by the principles set out in the Code for Crown Prosecutors.[56] The significance of the Code in the present context is that it sets out some of the relevant public interest criteria which have to be considered before a prosecution can be commenced or continued.

5.32 The Crown Prosecution Service continues to be guided by the principles expressed in the House of Commons by Lord Shawcross when he was Attorney-General, and subsequently endorsed by his successors, that

> "it has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecution worked provided that he should .. prosecute "wherever it appears that the offence or circumstances of its commission is or are of such a character that a prosecution in respect thereof is required with public interest". That is still the dominant consideration. [The duty of the Attorney General is to acquaint himself with all the relevant facts], including the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order and with any other consideration affecting public policy".[57]

5.33 The Code for Crown Prosecutors adopts this principle. It observes that the decision not to prosecute will vary from case to case "but broadly speaking; the graver the offence, the less likelihood there will be that the public interest will allow of a disposal less than prosecution, for example caution".[58] It says in relation to "staleness":

[55] Codification of the Criminal Law, A Report to the Law Commission, (1985), Law Com No 143, para 5.35.

[56] This Code was issued pursuant to s 10 of the Prosecution of Offences Act 1985 and was included in the Director's Annual Report to the Attorney-General, in the year in which it was issued (*ibid*, s 10(3)). This report was laid before Parliament and published (*ibid*, s 9). The Code, therefore, is a public declaration of the guidance on general principles on which the CPS will rely when it exercises its functions.

[57] *Hansard* (HC) 29 January 1951, vol 483, cols 681-683.

[58] Code for Crown Prosecutors (1992) para 8.

> "Regard must be had...to...the length of time which is likely to elapse before the matter can be brought to trial. The Crown Prosecutor should be slow to prosecute if the last offence was committed three or more years before the probable date of trial, unless, despite its staleness, an immediate custodial sentence of some length is likely to be imposed... . Generally the graver the allegation the less significance will be attached to the element of staleness."[59]

5.34 It follows that when three years have elapsed from the date of the wrongful act, a crown prosecutor should be "slow to prosecute" unless "an immediate custodial sentence of some length is likely to be imposed." The observance of this principle might in some cases amount to some form of limitation upon the prosecution's willingness to pursue charges of murder or manslaughter if, but only if, the defendant has previously been sent to prison for a substantial period for another offence. For example, in a case such as the Darlington case where the offender was originally sentenced to two years, the Code would not prevent a second prosecution for murder or manslaughter, for which a longer sentence might have been justified.[60] By contrast, in a case where, for example, the defendant had already served four years for unlawful wounding the Code would in most cases discourage a further prosecution for unlawful act manslaughter.[61] It is uncertain, because the operation of the rule has meant that the point has never been tested, whether a later prosecution for *murder* would always be appropriate.

Limitation periods in criminal proceedings

5.35 Another way in which the law protects defendants from the indefinite threat of criminal prosecution for an offence is through statutory time limits.[62] At common law, there is no time limit upon the Crown to commence a suit. In all cases where a time limit is not laid down by statute, a prosecution can be commenced at any time after the offence,[63] subject to the general proviso that a delay in commencing or pursuing a prosecution may amount to an abuse of the process of court.[64]

[59] *Ibid*, para 8 (ii).

[60] As we have not seen the court documents in this case, we cannot be more definite.

[61] See para 4.34 above for the average sentence imposed in manslaughter cases.

[62] For example, the Trade Descriptions Act 1968 s 19(1) sets a time limit of three years from the commission of the offence or one year from the first discovery of the prosecutor, whichever is the earlier, and under the Customs & Excise Management Act 1979 (as amended) s 146(A) a period of 20 years is set if the offence was indictable and three years if it was a summary offence.

[63] Stephen, in *A History of the Criminal Law of England* vol II p 2, recorded an indictment for a trivial theft, which was committed sixty years earlier.

[64] A trial for rape at Chester Crown Court was halted when the judge held that a delay of twenty years meant there could not be a fair trial. His Honour Judge Robin David held, on 3 February 1994, that due to the delay it would be "little short of bizarre to try an issue which depended upon the recollections of witnesses of events over 20 years ago": see [1994] 144 NLJ 186. However, in general, the power will be exercised sparingly: see para 5.20 above.

5.36 The issue of delay before prosecution for murder was discussed at some length in the House of Commons during the debate on the War Crimes Act 1991. The general view appeared to be that although delay in prosecution might lead to evidential problems, for example, witnesses' recollection of events will have blurred and identification might prove difficult, the passage of time alone should not absolve a murderer from judicial action. For example, John Patten MP, the Minister of State for the Home Office, said:

> "It would be a bad principle if Parliament were to decide that at some stage a crime stops being a live crime and becomes a dead one." [65]

John Marshall MP also said:

> "We have never had a statute of limitations on murder, and I do not believe that we should seek to introduce one this evening." [66]

5.37 Despite this general absence of limitation periods in English criminal law,[67] in Part VI we ask for the views of our readers on option 5, which is that the rule should be abolished and replaced with a time limit for prosecution for homicide offences. Because of the nature of homicide offences, however, it would, arguably, be necessary for the limitation period to start from the day the injury was inflicted rather than from the date of death. This would conflict with the normal practice which is that limitation periods form procedural bars running from the completion of the offence, that is, the death.[68]

[65] *Hansard* (HC) 19 March 1990, vol 169, col 972.

[66] *Hansard* (HC) 25 April 1990, vol 171, col 431.

[67] A number of continental jurisdictions contain limitation periods for all offences: see, for example, the provisions in Italian Penal Code 1930, § 157-158 and Austrian Penal Act 1852 and 1945 ss 227-230.

[68] See for example the Italian Penal Code 1930; § 158, Beginning of the Period of Limitation "...when the law makes punishability for the offence depend on the occurrence of a subsequent condition, the period of limitation shall run from the day on which the condition occurred". *American Series of Foreign Penal Codes* vol 23 (1978), Italian Penal Code.

PART VI

OPTIONS FOR REFORM

Introduction

6.1 In this Part we put forward, for consideration, provisional proposals and options as to how the law might be clarified, reformed and put on a statutory basis to form a part, in the longer term, of the criminal code.

6.2 As in all the Commission's consultation papers our proposals are accompanied by a summary of the arguments for and against the various alternatives that we suggest. The comments and criticisms of our readers are invited in respect of all parts of this Paper. They are sought particularly, however, on the options open to us for the reform and clarification of the law which we set out in this Part.

OPTION 1: RETAIN THE RULE.

6.3 This was the view of the CLRC in its 14th Report,[1] as well as being the view of the Association of Chief Police Officers[2] and the Howard League for Penal Reform[3] in their submissions to the Nathan Committee. The arguments in favour of that course have been set out and analysed in Part IV, paragraphs 4.13-4.45 above.

6.4 Our provisional view is that we do not favour this option because

(a) there is no need for the rule because of the progress in medical science which enables doctors to identify the cause of a death even though the event which might have caused it took place more than a year and a day before the death.[4] For example, no problems were caused when a jury was called upon to determine causation in a recent case where a victim died of an epileptic fit 11 months after being hit over the head.[5] Our researches have shown that in Scotland the absence of the rule has not caused any problems on this or any other grounds;

(b) the existence of the rule means that people whose cases satisfy all the other requirements of the offences of murder, manslaughter or a statutory road traffic

[1] See para 3.3 above.

[2] See para 3.9 above.

[3] See para 3.10 above. Compare with the submissions of the Law Commission, para 3.8 above, and the CPS, para 3.7 above, who favoured abolition of the rule.

[4] The CLRC in its 14th Report recognised that this was arguably the case, although it recommended retention of the rule on other grounds: see para 3.3 above. This was also the view of the CPS and the Law Commission in their representations to the Nathan Committee: see paras 3.7-3.8 above. See also the 1991 Report of the New Zealand Crimes Consultative Committee discussed in Appendix B para 9.

[5] *The Times* 28 April 1994: see n 38 to para 4.21 and para 5.9 above.

offence[6] involving death are unfairly and unnecessarily avoiding prosecution. The alternative offences with which they could be charged and convicted are perceived as less serious by the public and tend to attract less severe sentences.[7] Moreover, these alternative offences fail to reflect the essential criminal nature of the offender's act, that is, the culpable[8] causing of death. In addition, people who might be prosecuted for manslaughter based on gross negligence (such as grossly negligent doctors or directors of companies responsible through their gross negligence for disasters) cannot in many cases be prosecuted at all[9] if their victims survive for more than a year and a day because there is no alternative offence with which they can be charged. In consequence, defendants might find themselves either not being prosecuted at all or being prosecuted for much less serious offences merely because of the accident that their victim has survived for more than a year and a day, for example, by being kept alive on a life support machine;

(c) in jurisdictions in which the rule has never existed or in which it no longer exists,[10] there is no evidence, so far as we are aware, of any problems that have arisen or of any prejudice being suffered by the defendant, or that the administration of justice has been impeded in any way.

(d) it is unclear, in cases where there is an interval between the initiating act and the injuries caused,[11] when the time period starts to run. This lack of certainty in the law could cause a problem if ever a case of this type came before the courts.

6.5 We stress that this is our provisional view. **We ask anyone who believes that the rule should be retained in its present form to respond to this Paper, setting out their supporting reasons. It would be helpful if they could tell us the answers they have to the points we have raised in paragraphs 4.2-4.12 above**.

6.6 If, however, consultees are in favour of retaining the rule, we provisionally recommend that the law should be clarified to provide that the time period should start to run from the infliction of injury, rather than from the initiating act, where there is a delay between the two.[12] Otherwise, it would mean that there would be cases, for example, gross negligence manslaughter through the prescription of harmful medication which is not

[6] See Appendix A.

[7] See paras 4.27-4.45 above.

[8] Ie with the mental element required by law.

[9] See paras 4.25-4.26 above.

[10] The rule has been abolished in all but one state in Australia: see Appendix B paras 5-6 and Appendix C for the statutory provisions, and it is not a requirement in the United States Model Penal Code: see Appendix B para 10. South Africa, Scotland and virtually all the European Codes have never had a year and a day rule: see Appendix B paras 17-24.

[11] See paras 2.17-2.18 above.

[12] See paras 2.17-2.18 above.

taken for a year, or bombs activated by a timer more than a year after they are planted, in which no homicide prosecution could be launched. **We ask for the views of consultees on this issue.**

OPTION 2: MAKE THE RULE A REBUTTABLE PRESUMPTION

6.7 This would mean that in cases where death occurred more than a year and a day after the injury there would be a rebuttable presumption that the injury did not cause death.

6.8 Our provisional view is that such an amendment to the rule would be pointless because it is always for the prosecution to prove the cause of death beyond reasonable doubt.[13] We believe that this option amounts, in effect, to repealing the rule. Thus our arguments in respect of option 1 also apply with equal force in respect of this option. **We ask readers who favour this option to explain clearly why they do so.**

OPTION 3: AMEND THE RULE BY EXTENDING THE TIME LIMIT

6.9 Such a course was adopted in the Californian Penal Code[14] which imposes a three year and a day limit for murder or manslaughter running from "the stroke or the cause of death administered."

6.10 This option has the advantage of removing the legal fiction[15] that, through an irrebuttable presumption, after a year and a day the death is caused by natural causes. Instead, it makes the time limit an additional requirement for the offence. California has decided on a three year and a day limit. **We ask readers who favour this option to tell us what time limit should be imposed, and why they believe this to be the correct time limit**. We do not regard this option as attractive as it fails to address our objections to option 1, namely (a) that there is no need for the rule on grounds of causation due to advances in medical science, (b) that the rule allows those who satisfy all other requirements for a homicide offence to avoid prosecution, and (c) that in jurisdictions in which the rule has never existed, or in which it no longer exists, the absence of the rule does not appear to have caused any problems. Again, **if our readers disagree we would be interested to know why**.

OPTION 4: ABOLISH THE RULE FOR CERTAIN OFFENCES BUT RETAIN IT FOR OTHERS

6.11 We have described how, when the House of Commons recently debated the proposed repeal of the rule at the Committee stage of the Criminal Justice and Public Order Bill

[13] *Woolmington v DPP* [1935] AC 462.

[14] See Appendix B, paras 14-15.

[15] See HLA Hart and Tony Honoré, *Causation in the Law* (2nd ed 1985). They criticise the fusing of considerations of policy with the causal elements in responsibility and recommend in relation to the rule that:

> "The requirement that if the accused is to be guilty of murder the victim's death must supervene within one year and a day from his infliction of the wound...should be recognised for what it is - as a special limitation on the law of homicide... ." p 403.

the repeal related to the rule insofar as it related to murder.[16] At the Report stage, however, the scope of the proposed repeal extended to manslaughter as well as murder.[17] Neither proposal was accepted.

6.12 Although our provisional view is that no distinction should be made between different offences, **we ask for the views of our readers on this option**. For example, a distinction could be made between murder, "voluntary manslaughter", and aiding and abetting suicide,[18] where the offender will have intended to cause death or, at least, serious injury, and gross negligence manslaughter and causing death by dangerous driving and the other statutory driving offences based on causing death,[19] where the defendant need neither have intended nor foreseen causing any injury whatsoever.[20] Alternatively, the line could be drawn to leave the year and a day rule applicable to gross negligence manslaughter only, on the ground that, for that offence, it is only the fact that death is caused that makes the defendant's conduct criminal at all. **We ask consultees who favour this option to identify clearly the offences to which they think the rule should continue to apply, and why they hold these views.**

OPTION 5: ABOLISH THE RULE AND REPLACE IT WITH A TIME LIMIT FOR PROSECUTION OF HOMICIDE OFFENCES

6.13 This option would entail the introduction of a limitation period on the commencement of prosecution along the lines of those which apply to some statutory offences.[21]

6.14 Although such a limitation period would have a similar effect to the present rule there would be one basic difference - the limitation period would be a simple procedural bar and it would not involve a legal fiction or artificial rule about the cause of death.

6.15 Nevertheless the introduction of such a limitation period would also affect a much wider group of cases than those affected by the present rule. It would apply to limit the prosecution of cases where death follows immediately after injury, but where the identity or whereabouts of the person responsible is not established for a long time after the death

[16] Para 3.15 above.

[17] Para 3.17 above.

[18] See Appendix A.

[19] It is not, in any case, completely clear whether the rule applies to the statutory offences of causing death by dangerous driving, causing death by careless driving while under the influence of drink or drugs or causing death by aggravated vehicle taking: see para 2.14 above and Appendix A.

[20] It is difficult to decide into which of these two categories unlawful act manslaughter should fall. As we point out in our consultation paper on Involuntary Manslaughter, Consultation Paper No 135, in which we recommend the abolition of this offence, unlawful act manslaughter is based on constructive liability, and it is therefore not a requirement of the offence that the accused intended or foresaw causing death or serious harm. Nor, however, is it an offence of inadvertence, since the House of Lords in *Andrews v DPP* [1937] AC 576, held that negligent acts would not be sufficient to ground liability: see Consultation Paper No 135 paras 2.1-2.47.

[21] See n 62 to para 5.35 above.

takes place. For example, a limitation period of three years would mean that the assailant would have to be identified and charged within three years of the assault, even if his victim died the day after the attack and the only cause of any subsequent delay was attributable to lack of evidence or to the fact that the assailant could not be found.

6.16 It follows that while a limitation period of whatever length would apply to all the cases which are now covered by the year and a day rule, it would also apply to a potentially huge number of other cases, and this might seriously impede the work of the police and Crown Prosecution Service.

6.17 **We ask consultees who favour this option to tell us why and how long they think the limitation period should be. If consultees do not favour the introduction of a limitation period for all homicide offences they are invited to comment on the possibility of applying a limitation period to certain offences only, in particular, gross negligence manslaughter and statutory road traffic offences based on causing death.[22] Alternatively, different periods could be applied to each offence, as is the case in the continental jurisdictions which do have limitation periods on the commencement of prosecutions.[23]**

OPTION 6: ABOLISH THE RULE

6.18 The rule has been abolished in all the states in Australia save for Queensland which has been advised by its Criminal Code Review Committee to abolish the rule.[24] The Model Penal Code in the United States[25] does not contain the rule. Law reform bodies in Canada[26] and New Zealand[27] have advocated its abolition. The rule has never been part of the law of Scotland[28] or of South Africa.[29]

[22] For the reasons set out at para 6.12 above.

[23] For example, the German Draft Penal Code of 1962, § 127, suggests a period of 30 years in the case of acts punishable by life imprisonment, 20 years for offences punishable by more than 10 years imprisonment, 10 years for offences punishable by more than five years imprisonment, five years for offences punishable by between one and five years imprisonment and three years in all other cases. German law also now distinguishes between murder and all other offences. In 1979, the West German Bundestag voted to lift the Statute of Limitations, which had a 30 year limitation on the prosecution of crimes punishable by life imprisonment, for the offence of murder, while allowing it to remain for all other serious offences: see Robert A Monson "The West German Statute of Limitations on Murder: A Political, Legal, and Historical Exposition" [1982] 30 American Journal of Comparative Law 607.

[24] Appendix B paras 5-6: see Appendix C for the statutory provisions.

[25] Appendix B para 10.

[26] Appendix B para 3.

[27] Appendix B para 9.

[28] Appendix B, paras 18-23.

[29] Appendix B para 17.

6.19 We have considered this option very carefully and have come to the provisional view that this is the one which we should recommend. Our reasons for advocating the abolition of the rule are:

(a) That the rule appears to have become rooted in substantive law by way of a historical accident, rather than through any deliberate policy.[30]

(b) That with the advance of modern medical science it is possible to ascertain the cause of a death and in particular to point to a specific cause which may have arisen some years earlier.[31]

(c) That in consequence the rule operates to prevent convictions when the cause of death can be **shown** to be a wrongful act which occurred more than a year and a day before the death. In cases where the prosecution cannot satisfy the burden of proving causation there would be no problem because the defendant would then be acquitted.

(d) That the rule gives an almost total immunity to people who would have been guilty of gross negligence manslaughter if the victim had died within a year and a day of the infliction of injury.[32]

(e) That in many cases the rule leads to convictions for lesser crimes than are appropriate, typically, attempted murder or causing grievous bodily harm with or without intent, merely because the victim lived for more than a year and a day after the injury, for example, because he was kept alive on a life support machine.[33]

(f) That following on from the previous point, we have referred to instances which show that in some cases, the rule may lead to unacceptably low sentences being imposed.[34] An example is the substitution of a conviction for dangerous driving, which has a maximum sentence of two years' imprisonment, for the more serious offence of causing death by dangerous driving, which has a maximum sentence of ten years' imprisonment.[35]

[30] See paras 2.1-2.7 above.

[31] See para 4.19 above.

[32] See paras 4.5 and 4.25-4.26 above which deal with the problems of gross negligence manslaughter.

[33] See the *Oxford Times* case, in relation to wounding with intent to cause grievous bodily harm, the Cambridge case, in relation to attempted murder, and the Darlington case, in relation to causing grievous bodily harm, discussed in paras 1.7-1.8, and 4.3-4.4 above.

[34] See paras 4.30-4.35 (in relation to causing grievous bodily harm and attempted murder); and 4.36-4.38 (in relation to aiding and abetting suicide) above.

[35] See paras 4.39-4.45 above.

(g) That experience in Scotland has shown that a criminal justice system can operate fairly and effectively without the rule.

(h) That, in cases where there is a delay between the initiating act and the injury inflicted,[36] it is uncertain when the time period should start to run, which might cause problems if ever such a case came before the courts.

6.20 As we explained in Part V above, the pleas of autrefois convict and autrefois acquit will not prevent a defendant who has already been convicted of an offence of assault or attempted murder from being prosecuted for murder or manslaughter arising from the same events if the victim subsequently dies.[37] It is also doubtful whether a court would exercise its inherent discretion to stay proceedings on the ground of abuse of process in these circumstances, except in rare cases.[38] **We ask readers for their views as to whether they would be satisfied with this position**. There are two sides to this question.

6.21 **First, do the interests of justice, which may include a consideration of the feelings of the relatives of the deceased, in having the defendant prosecuted for a homicide offence justify the additional expenditure of public money?** As we observed in paragraph 5.10 above, if a second prosecution arising from the same facts is brought, every fact in issue must be separately proved again. This could be extremely expensive, bearing in mind that an average day of Crown Court time costs approximately £7,400[39] and that the accused will already have been dealt with and sentenced by the courts, in respect of the same conduct,[40] although the sentence may not reflect the gravity of the offence.[41]

6.22 Secondly, some readers may believe that it is unjust that a person should be exposed to the processes and sanctions of the criminal justice system twice in respect of a single act or omission. **We ask those consultees who believe that the present state of the law on double jeopardy may lead to injustice if the year and a day rule was to be abolished, to consider whether the rule should be modified to a "same transaction"**

[36] See paras 2.17-2.18 above.

[37] See paras 5.2-5.11 above.

[38] See paras 5.21-5.30 above. This is also the case in Scotland, where it has been established that a subsequent prosecution following the death of the victim is not precluded by the principle of res judicata and will not necessarily constitute an oppressive prosecution: see the discussion of the Christopher Tees case in Appendix B paras 21-23.

[39] This figure was provided by the Information Management Unit of the Lord Chancellor's Department (1993/4).

[40] Unless, of course, the offence is gross negligence manslaughter, where it is only the fact that death resulted that makes the conduct criminal: see paras 4.25-4.26 above.

[41] See para 6.4(b) above.

rule, as has been advocated by some commentators in the United States.[42] Such a rule would have the effect of barring a subsequent prosecution for an offence which derived from the same criminal transaction as had formed the basis of an earlier prosecution. It should be borne in mind, however, that the introduction of a rule like this would probably cause problems for the prosecution, which would be unsure whether to prosecute a defendant immediately with the appropriate non-fatal offence, or to withhold charges indefinitely in case the victim later died.

6.23 The principal reason given by the CLRC for the retention of the year and a day rule was that "...it would be wrong for a person to remain almost indefinitely at risk of prosecution for murder". **We ask our readers whether they consider that the combined safeguards of the principles which guide prosecutors when exercising their discretion whether or not to bring a prosecution and of the power of the courts to stay a prosecution on the grounds of abuse of process are sufficient to protect defendants from a stale and inappropriate prosecution. If not, what safeguards do our readers suggest?** Readers should bear in mind that the fact that the burden of proof rests on the prosecution will provide a further safeguard for the defendant, since, with the passage of time, the task of the prosecution will become increasingly difficult.

6.24 Commentators in the past have observed that there is no longer any justification for the rule on the grounds of causation because of the progress in modern medical science.[43] **We provisionally agree, but we ask for the views of readers on this point, particularly those with expert knowledge of these matters.**

Retroactivity

6.25 It should be noted that if this option is adopted, the abolition of the rule should only be effected prospectively. In other words, it should not apply to defendants who have caused death by acts or omissions committed before the legislation which abolishes the rule comes into force. This would accord with the policy of Article 7(1) of the European Convention on Human Rights, to which the United Kingdom is a party, which protects against retroactivity in the criminal law.[44] It provides

[42] See, for example, Justice Brennan in *Harris* (1977) 433 US 682, 683 and *Ashe* (1970) 397 US 436, 453-454. While the Supreme Court has extended the double jeopardy rule from its narrow beginnings in *Blockburger v United States* (1932) 248 US 299, 304, it has not gone as far, most recently in *Grady v Corbin* (1994) 110 S Ct 284, as adopting a same transaction test. See generally the review of leading cases in the 1989 term of the Supreme Court [1990] 104 Harvard Law Review pp 149-158.

[43] See paras 4.13-4.23 and 6.4(a) above and the authorities referred to there.

[44] The most important case brought under Article 7 was *Ireland v United Kingdom* (Application 5454/72 of 6 March 1972; *Yearbook* XV, 1972). Legislation provided that persons would be deemed to be guilty of criminal offences if they failed to comply with the orders of a member of the security forces. The case was withdrawn on the strength of an undertaking by the United Kingdom that no one would be held guilty of a criminal offence by reason of this legislation on account of an act or omission which was not a criminal offence when it occurred.

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed... .[45]

It is uncertain whether, in fact, the abolition of the year and a day rule retroactively would offend against this article because, with the important exception of gross negligence manslaughter, the act or omission of the defendant in question would have constituted a criminal offence, albeit not an offence of homicide, before the rule was abolished.[46]

6.26 Article 7(2) provides a limited exception to this general principle

> This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law recognised by civilised nations.

This Article was introduced to make it clear that trials for war crimes which involved acts contrary to international law could be brought without contravening the Convention. The extent of the exception beyond its application to war crimes is not clear.[47] The Article was relied upon by the Government when it introduced the War Crimes Act 1991. It was generally accepted that the proposals did not create a new offence,[48] but there was great concern about the retrospective change in jurisdiction, particularly in the House of Lords, which refused to pass the Bill in the 1989-90 session of Parliament.[49] Although it was

[45] The rest of Article 7(1) provides that no heavier penalty can be imposed than that applicable at the time the offence was committed.

[46] It is interesting to note that in the American case of *People v Stevenson* (1982) 331 NW 2d 143 the Supreme Court of Michigan decided that the year and a day rule could not be abolished retroactively after hearing argument that, inter alia, the year and a day rule was one of evidence and procedure and not substance; that the defendant had fair notice that his conduct was criminal; that the defendant did not rely on the year and a day rule; and that adherence to an archaic legal fiction should not free the victim's killer.

[47] In the *De Becker* case (Application 214/56, *Yearbook* II 1958-9), the applicant had been punished by Belgium for collaboration. He complained that the law under which he was convicted violated the Article 7 principle. His complaint was not accepted by the Commission. Robertson and Merrills, *Human Rights in Europe* (3rd ed 1993) p 127 suggest that collaboration is not a crime under international law and doubt the Commission's decision.

[48] The then Home Secretary David Waddington, MP (*Hansard* (HC) 12 December 1989, vol 163, col 877) reflected this argument when he said:

> "This is not a proposal to criminalise actions that were not criminal at the time. It is a proposal to give our courts power to try here actions which were undeniably criminal and which the perpetrators must have known were wicked and criminal".

However, there was dissent from this view: see Lord Campbell of Alloway (*Hansard* (HL) 4 December 1989, vol 513, col 618) with reference to genocide and crimes against humanity.

[49] A former Lord Chancellor, Lord Havers (*Hansard* (HL) 4 December 1989, vol 513, col 645) considered that what was being proposed was "far worse" than the enactment of subsequent legislation making illegal what was legal at the time it occurred. The proposals would give

acknowledged that this legislation was permitted by Article 7(2), the general distaste for any retrospective law created a large amount of dissent.[50] We presume that any suggestion that the abolition of the year and a day rule should be retrospective would encounter an equal amount of opposition, but **we ask for readers' comments on this matter**.

jurisdiction to the courts in respect of people over whom they had never previously had jurisdiction. It introduced an entirely new class of defendants.

[50] Edward Heath MP (*Hansard* (HC) 19 March 1990, vol 169, col 925) was worried that if retrospective legislation was allowed in this sphere, Parliament would be prepared to act retrospectively in others. Lord Campbell of Alloway (*Hansard* (HL) 4 December 1989, vol 513, col 618) considered retrospective legislation an "anathema".

PART VII

SUMMARY OF OUR PROVISIONAL PROPOSALS AND QUESTIONS FOR CONSULTATION

7.1 In Part VI of this Paper we discuss in some detail a number of alternative policy options in connection with the year and a day rule. We ask readers to tell us which of the following options they favour, and to give reasons in support of their choice:-

Option one: Retain the rule

7.2 Our provisional view is that we do not favour this option for the reasons set out in paragraph 6.4. We ask any readers who favour this option to let us know how they would answer the points we make in paragraphs 4.2-4.12 of this Paper. If any readers do favour this option, we ask them to tell us when the time period should start in cases where there is a delay between the initiating act and the infliction of injury (see paragraphs 2.17-2.18).

Option two: Make the rule a rebuttable presumption

7.3 This option is discussed in paragraphs 6.7-6.8. Our provisional view is that this option would have a similar effect to option 6, complete abolition, but without the simplicity of that option, and for this reason we do not recommend it.

Option three: Amend the rule by extending the time limit

7.4 We ask readers who favour this option, which is discussed in paragraphs 6.9-6.10, to give us their reasons, to tell us what time limit should be imposed, and why they think this to be the appropriate time limit.

Option four: Abolish the rule for certain offences but retain it for others

7.5 This option is examined in paragraphs 6.11-6.12. We ask anyone who prefers this option to identify the offences to which they think the rule should continue to apply, giving us their supporting reasons.

Option five: Abolish the rule and replace it with a time limit for prosecution of homicide offences

7.6 We discuss this option in paragraphs 6.13-6.17. We ask consultees who prefer this option to tell us: (1) how long should the limitation period be? (2) should it apply to all homicide offences, or to certain offences only? (3) alternatively, should different time limits be applied to different homicide offences?

Option six: Abolish the rule

7.7 We provisionally recommend this option, which we explain in paragraphs 6.18-6.24. In paragraphs 6.25-6.26 we provisionally recommend that, if the rule is abolished, it should be abolished prospectively. If readers favour this option we ask them to let us know:

(1) Is the present position with regard to double jeopardy[1] satisfactory? If not, should it be modified to a "same transaction" rule? (2) Are the combined safeguards of the discretion of prosecutors not to bring proceedings and of the power of the courts to stay a prosecution for abuse of process adequate to protect a defendant from a stale and inappropriate prosecution? (3) Will the abolition of the rule cause any particular problems for expert witnesses or jurors with regard to causation?[2] (4) Should the rule be abolished prospectively ? If not, how can retrospective abolition be justified?

[1] See paras 6.20-6.22 above.

[2] See para 6.24 above.

APPENDIX A

THE RELEVANT STATUTORY OFFENCES

Infanticide Act 1938, section 1.

(1) Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

(2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.

(3) Nothing in this Act shall affect the power of the jury upon an indictment for the murder of a child to return a verdict of manslaughter, or a verdict of guilty but insane...

Homicide Act 1957, section 4.

(1) It shall be manslaughter, and shall not be murder, for a person acting in pursuance of a suicide pact between him and another to kill the other or be a party to the other...being killed by a third person.

(2) Where it is shown that a person charged with the murder of another killed the other or was a party to his...being killed, it shall be for the defence to prove that the person charged was acting in pursuance of a suicide pact between him and the other.

(3) For the purposes of this section "suicide pact" means a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life, but nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact.

Suicide Act 1961, section 2.

(1) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.

(2) If on the trial of an indictment for murder or manslaughter it is proved that the accused aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of that offence.

(3) The enactments mentioned in the first column of the First Schedule to this Act shall have effect subject to the amendments provided for in the second column (which preserve in relation to offences under this section the previous operation of those enactments in relation to murder or manslaughter).

(4) ...no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.

Road Traffic Act 1991, sections 1 to 4 .

1. For sections 1 and 2 of the Road Traffic Act 1988 there shall be substituted -

"1. A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.

2. A person who drives a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.

2A. (1) For the purposes of sections 1 and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if) -

(a) the way he drives falls far below what would be expected of a competent and careful driver, and

(b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

(2) A person is also to be regarded as driving dangerously for the purposes of sections 1 and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.

(3) In subsections (1) and (2) above "dangerous" refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.

(4) In determining for the purposes of subsection (2) above the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried."

2. For section 3 of the Road Traffic Act 1988 there shall be substituted -

"3. If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable

consideration for other persons using the road or place, he is guilty of an offence."

3. Before section 4 of the Road Traffic Act 1988 there shall be inserted -

"3A- (1) If a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, and -

(a) he is, at the time when he is driving, unfit to drive through drink or drugs, or

(b) he has consumed so much alcohol that the proportion of it in his breath, blood or urine at that time exceeds the prescribed limit, or

(c) he is, within 18 hours after that time, required to provide a specimen in pursuance of section 7 of this Act, but without reasonable excuse fails to provide it,

he is guilty of an offence.

(2) For the purposes of this section a person shall be taken to be unfit to drive at any time when his ability to drive properly is impaired.

(3) Subsection (1)(b) and (c) above shall not apply in relation to a person driving a mechanically propelled vehicle other than a motor vehicle."

4. In section 4 of the Road Traffic Act 1988, in subsections (1), (2) and (3) for the words "motor vehicle" there shall be substituted the words "mechanically propelled vehicle".

Road Traffic Act 1988, sections 4 and 5.

4.-(1) A person who, when driving or attempting to drive a [mechanically propelled vehicle] on a road or other public place, is unfit to drive through drink or drugs is guilty of an offence.

(2) Without prejudice to subsection (1) above, a person who, when in charge of a [mechanically propelled vehicle] which is on a road or other public place, is unfit to drive through drink or drugs is guilty of an offence.

(3) For the purposes of subsection (2) above, a person shall be deemed not to have been in charge of a [mechanically propelled vehicle] if he proves that at the material time the circumstances were such that there was no likelihood of his driving it so long as he remained unfit to drive through drink or drugs.

(4) The court may, in determining whether there was such a likelihood as is mentioned in subsection (3) above, disregard any injury to him and any damage to the vehicle.

(5) For the purposes of this section, a person shall be taken to be unfit to drive if his ability to drive properly is for the time being impaired.

(6) A constable may arrest a person without warrant if he has reasonable cause to suspect that that person is or has been committing an offence under this section.

(7) For the purpose of arresting a person under the power conferred by subsection (6) above, a constable may enter (if need be by force) any place where that person is or where the constable, with reasonable cause, suspects him to be.

(8) Subsection (7) above does not extend to Scotland, and nothing in that subsection affects any rule of law in Scotland concerning the right of a constable to enter any premises for any purpose.

5.-(1) If a person -

(a) drives or attempts to drive a motor vehicle on a road or other public place, or

(b) is in charge of a motor vehicle on a road or other public place,

after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence.

(2) It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.

(3) The court may, in determining whether there was such a likelihood as is mentioned in subsection (2) above, disregard any injury to him and any damage to the vehicle.

Theft Act 1968, sections 12 and 12A.

12. (1) Subject to subsections (5) and (6) below, a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another's use or, knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried in or on it.

(2) A person guilty of an offence under subsection (1) above shall [be liable on summary conviction to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding six months, or to both.]

(3) ...

(4) If on the trial of an indictment for theft the jury are not satisfied that the accused committed theft, but it is proved that the accused committed an offence under subsection (1) above, the jury may find him guilty of the offence under subsection (1) [and if he is found guilty of it, he shall be liable as he would have been liable under subsection (2) above on summary conviction].

(5) Subsection (1) above shall not apply in relation to pedal cycles; but, subject to subsection (6) below, a person who, without having the consent of the owner or other lawful authority, takes a pedal cycle for his own or another's use, or rides a pedal cycle knowing it to have been taken without such authority, shall on summary conviction be liable to a fine not exceeding [level 3 on the standard scale].

(6) A person does not commit an offence under this section by anything done in the belief that he has lawful authority to do it or that he would have the owner's consent if the owner knew of his doing it and the circumstances of it.

(7) For purposes of this section -

(a) "conveyance" means any conveyance constructed or adapted for the carriage of a person or persons whether by land, water or air, except that it does not include a conveyance constructed or adapted for use only under the control of a person not carried in or on it, and "drive" shall be construed accordingly; and

(b) "owner", in relation to a conveyance which is the subject of a hiring agreement or hire-purchase agreement, means the person in possession of the conveyance under that agreement.

12A. (1) Subject to subsection (3) below, a person is guilty of aggravated taking of a vehicle if -

(a) he commits an offence under section 12(1) above (in this section referred to as a "basic offence") in relation to a mechanically propelled vehicle; and

(b) it is proved that, at any time after the vehicle was unlawfully taken (whether by him or another) and before it was recovered, the vehicle was driven, or injury or damage was caused, in one or more of the circumstances set out in paragraphs (a) to (d) of subsection (2) below.

(2) The circumstances referred to in subsection (1)(b) above are -

(a) that the vehicle was driven dangerously on a road or other public place;

(b) that, owing to the driving of the vehicle, an accident occurred by which injury was caused to any person;

(c) that, owing to the driving of the vehicle, an accident occurred by which damage was caused to any property, other than the vehicle;

(d) that damage was caused to the vehicle.

(3) A person is not guilty of an offence under this section if he proves that, as regards any such proven driving, injury or damage as is referred to in subsection (1)(b) above, either -

(a) the driving, accident or damage referred to in subsection (2) above occurred before he committed the basic offence; or

(b) he was neither in nor on nor in the immediate vicinity of the vehicle when that driving, accident or damage occurred.

(4) A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or, if it is proved that, in circumstances falling within subsection (2)(b) above, the accident caused the death of the person concerned, five years.

(5) If a person who is charged with an offence under this section is found not guilty of that offence but it is proved that he committed a basic offence, he may be convicted of the basic offence.

(6) If by virtue if subsection (5) above a person is convicted of a basic offence before the Crown Court, that court shall have the same powers and duties as a magistrates' court would have had on convicting him of such an offence.

(7) For the purposes of this section a vehicle is driven dangerously if -

(a) it is driven in a way which falls far below what would be expected of a competent and careful driver; and

(b) it would be obvious to a competent and careful driver that driving the vehicle in that way would be dangerous.

(8) For the purposes of this section a vehicle is recovered when it is restored to its owner or to other lawful possession or custody; and in this subsection "owner" has the same meaning as in section 12 above.

Merchant Shipping Act 1988, section 32.

The following section shall be substituted for section 27 of the Merchant Shipping Act 1970 -

"27.- (1) This section applies-

(a) to the master of, or any seaman employed in, a ship registered in the United Kingdom; and

(b) to the master of, or any seaman employed in, a ship which -

(i) is registered under the law of any country outside the United Kingdom, and

(ii) is in a port in the United Kingdom or within the seaward limits of the territorial sea of the United Kingdom while proceeding to or from any such port.

(2) If a person to whom this section applies, while on board his ship or in its immediate vicinity-

(a) does any act which causes or is likely to cause-

(i) the loss or destruction of or serious damage to his ship or its machinery, navigational equipment or safety equipment, or

(ii) the loss or destruction of or serious damage to any other ship or any structure, or

(iii) the death of or serious injury to any person, or

(b) omits to do anything required -

(i) to preserve his ship or its machinery, navigational equipment or safety equipment from being lost, destroyed or seriously damaged, or

(ii) to preserve any person on board his ship from death or serious injury, or

(iii) to prevent his ship from causing the loss or destruction of or serious damage to any other ship or any structure, or the death of or serious injury to any person not on board his ship,

and either of the conditions specified in subsection (3) of this section is satisfied with respect to that act or omission, he shall (subject to subsections (6) and (7) of this section) be guilty of an offence.

(3) Those conditions are -

(a) that the act or omission was deliberate or amounted to a breach or neglect of duty;

(b) that the master or seaman in question was under the influence of drink or a drug at the time of the act or omission.

(4) If a person to whom this section applies -

(a) discharges any of his duties, or performs any other function in relation to the operation of his ship or its machinery or equipment, in such a manner as to cause, or to be likely to cause, any such loss, destruction, death or injury as is mentioned in subsection (2)(a) of this section, or

(b) fails to discharge any of his duties, or to perform any such function, properly to such an extent as to cause, or to be likely to cause, any of those things,

he shall (subject to subsections (6) and (7) of this section) be guilty of an offence.

(5) A person guilty of an offence under this section shall be liable -

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.

(6) In proceedings for an offence under this section it shall be a defence to prove -

(a) in the case of an offence under subsection (2) of this section where the act or omission alleged against the defendant constituted a breach or neglect of duty, that the defendant took all reasonable steps to discharge that duty;

(b) in the case of an offence under subsection (4) of this section, that the defendant took all reasonable precautions and exercised all due diligence to avoid committing the offence; or

(c) in the case of an offence under either of those subsections -

(i) that he could have avoided committing the offence only by disobeying a lawful command, or

(ii) that in all the circumstances the loss, destruction, damage, death or injury in question, or (as the case may be) the likelihood of its being caused, either could not reasonably have been foreseen by the defendant or could not reasonably have been avoided by him.

(7) In the application of this section to any person falling within subsection (1)(b) of this section, subsections (2) and (4) shall have effect as if paragraphs (a)(i) and (b)(i) of subsection (2) were omitted; and no proceedings for an offence under this section shall be instituted against any such person -

(a) in England and Wales, except by or with the consent of the Secretary of State or the Director of Public Prosecutions;

(b) in Northern Ireland, except by or with the consent of the Secretary of State or the Director of Public Prosecutions for Northern Ireland.

(8) In this section -

"breach or neglect of duty", except in relation to a master, includes any disobedience to a lawful command;

"duty" -

(a) in relation to a master or seaman, means any duty falling to be discharged by him in his capacity as such; and

(b) in relation to a master, includes his duty with respect to the good management of his ship and his duty with respect to the safety of operation of his ship, its machinery and equipment; and

"structure" means any fixed or movable structure (of whatever description) other than a ship."

Offences against the Person Act 1861, sections 18, 20 and 47.

18. Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person...with intent,...to do some...grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable...to be kept in penal servitude for life... .

20. Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being convicted thereof shall be liable...to be kept in penal servitude... .

47. Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable...to be kept in penal servitude... .

APPENDIX B

THE YEAR AND A DAY RULE IN OTHER JURISDICTIONS

Canada

1. Since 1892, the Canadian Criminal Code has contained no general causation principles. There are, however, a number of specific homicide causation rules. One of these special rules is the year and a day rule, which is expressly preserved in section 210 of the Canadian Criminal Code:

> 210. No person commits culpable homicide or the offence of causing the death of a person by criminal negligence or by means of the commission of an offence under subsection 233(4)[1] or subsection 239(3)[2] unless the death occurs within one year and one day from the time of the occurrence of the last event by means of which he caused or contributed to the cause of death.

2. In his Canadian criminal law textbook, Stuart[3] recommended that this rule should be abolished:

> "This is a classic example of an arbitrary rule created to deal with an anticipated problem - evidential difficulties when impending death lingers. What if death occurs within one year and two days and the causal link is established? The rule operates capriciously where the evidential problem *is* absent. This criticism was always valid; it has an added pertinence today with the advent of life-supporting technology. We do not have time limits for prosecution of all other serious offences. The anomaly should go."

3. In "Recodifying the Criminal Law"[4] the Law Reform Commission of Canada recommended that the specific causation provisions for homicide, including the year and a day rule, should be subsumed under the general causation provision in section 2(6).[5] Following the publication of that Report, the federal and provincial governments embarked upon a project to consider possible reform of Canadian homicide law. The Final Report of a Federal/Provincial Working Group on Homicide, published in June 1990, also recommended the replacement of the miscellaneous rules on causation, currently found in section 224-227 of the Code, with a general provision stating that

[1] Causing death by dangerous driving. Footnote added.

[2] Causing death by driving while under the influence of alcohol or a drug. Footnote added.

[3] D Stuart, *Canadian Criminal Law* (2nd ed 1987) p 105.

[4] Law Reform Commission of Canada, Report 31 p 56.

[5] Which states:
Causation. Everyone causes a result when his conduct substantially contributes to its occurrence and no other unforeseen and unforeseeable cause supersedes it.

"Everyone causes death, when their conduct significantly contributes to death, notwithstanding that there may be other significant contributory factors and that such conduct may not alone have caused death."[6]

Australia

4. Under the Australian Constitution of 1900, the legislative powers of the Parliament of the Commonwealth are restricted to certain fields. Section 51 allows Commonwealth legislation in such matters as foreign and interstate trade, taxation, defence, bankruptcy, intellectual property, marriage, divorce, and industrial conciliation and arbitration. The residue of legislative authority is retained by the individual states. Penal offences can be created by the Commonwealth only as an incident to the exercise of one of the certain specific powers reserved to it by the Constitution. Of the states, Queensland, Western Australia and Tasmania have adopted a regime of criminal regulation in the form of a code, while New South Wales, Victoria and South Australia remain common law jurisdictions.

5. The year and a day rule was a common law rule in Victoria, as established in *Evans (No 2)*,[7] until very recently. In that case the deceased was stabbed in the stomach by the two defendants in April 1974. A bowel resection operation was performed successfully, and the deceased resumed an apparently healthy life until approximately 11 months later when he died after a fibrous ring at the site of the operation caused a stricture in the small bowel. Each applicant was convicted for manslaughter. The Supreme Court discussed, obiter, what the position would have been had the deceased died more than a year and a day after the infliction of the original injury:

"If death does not ensue until after the expiration of a year and a day from the date when the injury causing death was inflicted, an irrebuttable presumption of law that the death was attributable to some other cause arises, and the person who inflicted the injury is not punishable for either murder or manslaughter."[8]

However, the year and a day rule was abolished in 1991 by the Crimes (Year and A Day Rule) Act 1991 (Victoria).[9] Similar statutes abolishing the year and a day rule have also been passed in the other two common law states, New South Wales and South Australia.[10]

[6] Final Report of the Federal/Provincial Working Group on Homicide 1990, updated 1991, p 14.

[7] [1976] VR 523. Supreme Court of Victoria.

[8] *Ibid*, 524.

[9] See Appendix C.

[10] Crimes (Injuries) Amendment Act 1990 (NSW), and Criminal Law Consolidation (Abolition of the Year and a Day Rule) Amendment Act 1991 (SA): see Appendix C.

6. The year and a day rule was also originally preserved in the Codes of all three code states: Queensland Code, section 299[11]; Western Australia Code, section 276[12]; Tasmania Code, section 155.[13] However, the rule has recently been removed from the Western Australia Code by the Criminal Law Amendment Act 1991,[14] and also from the Tasmanian Code.[15] This leaves Queensland as the only state to retain the year and a day rule, although there, too, change is now contemplated following the Final Report of the Queensland Criminal Code Review Committee. That Committee recommended, in 1992, that section 299 of the Queensland Code, Limitation as to time of death, should be repealed. The Committee concluded that

> "This section is a restatement of a common law rule which originated when medical science was not sufficiently advanced to determine complex issues of causation as to death. The arbitrary rule was adopted that there could be no criminal liability unless death occurred within a year an a day of its alleged cause. The rule is now anomalous."[16]

7. In his textbook on the Australian criminal law, written before the recent legislative changes, Fisse[17] said that "the utility of the year-and-a-day rule nowadays is doubtful in the extreme". He also said that it was not clear whether the year and a day rule applied to modern statutory offences of homicide, such as causing death by driving, or was limited to the common law felonies of murder and manslaughter. He believed that the common law courts of Australia could have taken a line similar to that taken in a number of American decisions[18] holding that the rule was one of evidence or procedure, which could be displaced by adequate proof of causation. Gilles,[19] another textbook writer, also agreed that the year and a day rule was unnecessary and should be abolished.

[11] Section 299. Limitation as to Time of Death.
A person is not deemed to have killed another if the death of that other person does not take place within a year and a day of the cause of death.

[12] This section is identical to s 299 of the Queensland Code.

[13] Section 155(1):
A person is not criminally responsible for the death of another if such death takes place more than a year after the injury causing it.

[14] See Appendix C.

[15] Section 4 Criminal Code Amendment (Year and a Day Rule Repeal) Act 1993: see Appendix C.

[16] Final Report of the Criminal Code Review Committee to the Attorney General, June 1992, Sch 2: Sections Recommended for Repeal, Commentary on s 299 - Limitation as to time of death p 11.

[17] *Howard's Criminal Law* (5th ed 1990) p 31.

[18] See para 13 below.

[19] Gilles, *Criminal Law* (2nd ed 1990) p 573-574.

New Zealand

8. Section 162(1) of the Crimes Act 1961 states that "no one is criminally responsible for the killing of another unless the death takes place within a year and a day after the cause of death". This rule appears to be of general application, applying to all forms of unlawful killing.

9. The Crimes Consultative Committee in its 1991 Report on the Crimes Bill 1989 recommended the abolition of the rule.

> "We examined whether this ancient rule of causation has any relevance today. It may be noted that both the Criminal Law Revision Committee in its 14th Report in 1980 and the English Law Commission in its draft code propose the retention of the rule.
>
> The broad reasoning behind the rule is that it would be wrong for a person to remain almost indefinitely at risk of prosecution for murder. In reaching its conclusion that retention of the rule is not desirable the Committee weighed the following arguments.
>
> > The time limit imposed is essentially arbitrary. The perpetrator's culpability becomes irrelevant on a fixed day.
> >
> > Where death occurs immediately, but the perpetrator escapes, continuing jeopardy is not seen to be a problem.
> >
> > It is wrong to confine the notion of "killing" to the infliction of speedy death.
> >
> > Medical science has greatly reduced earlier problems of causation in linking injury to a death that occurs some considerable time later.
> >
> > In practical terms the prosecution has to weigh the circumstances and the evidence, consider the victim's prognosis and decide whether it is more appropriate to lay lesser charges. This will be particularly so where the victim is being kept alive on a life support machine.
>
> One commentator has said of the rule that it can be seen as "a rule of limitation masquerading under the appearance of a rule of causation...it prevents some homicides in fact from being treated as homicides in law.. Its continuing utility must be open to serious question". (DEC Yale, [1989] CLJ 202, 213.)

The Committee agrees with that summation."[20]

United States of America

Model Penal Code

10. Section 2.03 of the Model Penal Code[21] (hereafter "MPC") states the general requirements of causation which are to apply to the Code offences:

> **Section 2.03.**
>
> (1) Conduct is the cause of a result when:
>
> (a) it is an antecedent but for which the result in question would not have occurred; and
>
> (b) the relationship between the conduct and result satisfies any additional requirements imposed by the Code or by the law defining the offense.

While there is provision for the imposition of extra requirements depending on the specific offence involved, the definition of criminal homicide in § 210.1, makes no such additional requirement as to causation: in other words, the MPC does not require that death of another take place within a year and a day of the actor's conduct.

11. The Commentary to the MPC indicates that of the modern statutes in which the rule has been recently considered, the majority are in accord with the MPC in eliminating the express time limitation as a special causal requirement for homicide.[22]

12. La Fave & Scott[23] in their summary of the current status of the rule in the US, agree that the modern trend is to abolish the rule. However, they say that the rule has survived, either by judicial decision or statute, in most states.[24] This apparent contradiction arises because in the majority of states either the legislature or the courts have not had a chance to consider the issue; or, alternatively, although the issue has

[20] Report of the Crimes Consultative Committee 1991, pp 51-52.

[21] The Model Penal Code, completed in 1962, although not of strict binding authority, has played an important part in the widespread revision and codification of the substantive criminal law of the United States. On a judicial level, ceratin parts of the Code material have been used as an aid to the interpretation of the various codes and in restating and reshaping areas of the unwritten law. See Director of the American Law Institute, Herbert Wechsler's, Foreword (30 May 1984) to the Model Penal Code and Commentaries (1985), Part I, vol 1 pp xi-xiv.

[22] American Law Institute Model Penal Code and Commentaries Part II pp 9-10. Several states, however, retain this common-law requirement in their homicide statutes, for example, Louisiana and Nevada, La § 14:29, Nev § 200.100. See Model Penal Code and Commentaries p 9 n 15: see also the discussion of the California Criminal Code in para 14 below, which now contains a three years and a day rule.

[23] *Criminal Law* (2nd ed 1986) p 299.

[24] They refer in particular to *State v Minster* (1985) 302 Md 240, 486 A 2d 1197 when, following a survey of the field and citing authorities, the court concluded that the rule remains in 26 states.

arisen before the courts, the courts have stressed that any abolition of the rule, however outdated they believe it has become, is a matter for the legislature.[25]

13. In a number of states, however, the courts have abolished the common law year and a day rule.[26] Often in states where the year and a day rule would appear to apply, the courts have removed the force of the rule by interpreting it as no more than a rule of evidence or procedure. This was the approach, for example, of the Supreme Court of Pennsylvania in *Commonwealth v Ladd*.[27]

14. One final option which has been explored in the USA is the modification of the rule, in particular, by extending the time limit. The Californian Penal Code §194 which originally incorporated the year and a day rule into Californian law was amended in 1969. It now reads:

> To make the killing either murder or manslaughter, it is requisite that the party die within three years and a day after the stroke received or the cause of death administered. In the computation of such time, the whole of the day on which the act was done shall be reckoned the first.[28]

15. This amendment was considered by the California Court of Appeal in *People v Snipe*.[29] The deceased child was beaten on 26 February 1969, and died some 21 months later. At the time of the beating, statute made killing either murder or manslaughter if the deceased died within a year and a day. The amendment to this statute, changing the time requirement, became effective in November 1969, several months before the immunity of the prior statute had attached. The court held that in these circumstances the amendment of the time requirement did not deprive the defendants of a vested defence and thus did not contravene constitutional proscription against an ex post facto law. The defendant could therefore be charged with murder, despite the fact that the assault took place at a time when the law was that the death had to ensue within a year and a day of the original injury.

[25] See *State v Minster* (1985) 302 Md 240, 486 A 2d 1197 and *Elliot v Mills* (1959) 335 P 2d 1104 (Okl).

[26] Massachusetts - *Commonwealth v Lewis* (1980) 381 Mass 411, 409 NE 2d 771, Michigan - *People v Stevenson* (1982) 416 Mich 383, 331 NW 2d 143, New Jersey - *State v Young* (1978) 77 NJ 245, 390 A 2d 556, *People v Brengard* (1934) 265 NY 100, 191 NE 850.

[27] (1960) 402 Pa 164, 116 A 2d 501. This approach allowed the court to apply the ruling retrospectively because it was a change in evidentiary procedure, rather than a change to the substance of the offence.

[28] West's Annotated Penal Codes p 489.

[29] (1972) 102 Cal Rptr 6.

16. This legislative amendment was also relied on by Conford PJ when he proposed changes to New Jersey law in his dissenting judgment in *State v Young*.[30] He recognised that the year and a day rule served a useful purpose at common law, but he said that the advance of medical science since the medieval era in which the year and a day rule originated suggested the desirability of extending the period substantially beyond a year and a day. Policy considerations still justified a fixed period of some kind, because formidable evidential disputes might still arise, and because it would be unjust to allow a prosecution for murder to hang over a defendant's head indefinitely. He followed the California legislature in proposing that the court should amend the rule to a period of three years. The majority of the Supreme Court of New Jersey,[31] however, held that the rule should be completely abolished, although this change would not operate retroactively so as to incriminate for murder the defendant before the court.

Jurisdictions where the year and a day rule has never applied

South Africa

17. Hunt[32] makes it clear that South African law[33] accepts no time limitation in assessing cause of death. The case which firmly established this principle was *S v Gabriel*.[34] The appellant had been charged with the attempted murder of his wife committed on 9 December 1967. He was convicted and sentenced to four years imprisonment. His wife died on 12 December 1969 and he was thereafter charged with her murder. The appellant's argument - that the death was more than a year and a day after the injury was inflicted and that in such cases there was an irrebuttable presumption that death was attributable to some other cause - was dismissed, and he was found guilty and sentenced to eight years imprisonment. It was held on appeal that the exception to the indictment had been rightly dismissed; Roman-Dutch law contained no presumption of the type contended for. The judgment of the trial judge was confirmed. First, Goldin J had held that the rule was a rule of substantive law, and not a rule of evidence which would have been incorporated into South African law by section 340 of the Criminal Procedure and Evidence Act. This point was accepted by the appellant on appeal. Further, Lewis JA, who delivered judgment on this aspect of the appeal,[35] agreed that Roman-Dutch law did not itself provide a time limit after which a charge of murder could not be presented against the person who inflicted the injury. The court also confirmed that the principle of autrefois convict[36] was not available to the appellant because at his

[30] (1978) 390 A 2d 556, 561-562.

[31] Clifford J, Hughes CJ and Handler J.

[32] Hunt, *South African Criminal Law and Procedure* (2nd ed 1987) vol II Common Law Crimes p 361.

[33] Outside the Transkei, where the year and a day rule is contained in s 136 of Act 24 of 1886 (C).

[34] (1971) 1 SA 646. Rhodesia Appellate Division. The Rhodesian appellate court based their decision on the common law of South Africa.

[35] *Ibid*, p 665.

[36] See paras 5.2-5.11 above.

previous trial for attempted murder it had not been possible to prefer the more serious charge of murder.[37]

Scotland

18. There are no special time limits with respect to causation in homicide in Scotland. As an established Scottish textbook[38] puts it:

> "It does not matter how long the victim survives the accused's act or omission, although the longer he does survive the more difficult it will be to show that the death was caused by the accused, particularly if the victim apparently recovered from the accused's act and then sustained a fresh injury."[39]

19. The absence of a year and a day rule in Scotland was raised by the Crown Office in its evidence to the Nathan Committee.[40] In its memorandum, it noted that

> "Scots Law does not distinguish between immediate death of the victim and a lingering death caused by the injury."

20. The relevance of this statement to the year and a day rule was explored during examination of witnesses.[41] The Home Advocate Depute, Mr Penrose, made it clear that no problems had arisen in Scotland due to the absence of a year and a day rule.

21. A recent case[42] has also confirmed that it is possible in Scotland to charge a defendant with homicide after the death of the victim even if he has already been convicted of a non-fatal offence. This issue was dealt with by the Lord Justice Clerk in an appeal by Christopher Tees in October 1993. On 20 July 1990, the accused assaulted the victim, causing him severe injury. He appeared before the High Court on 3 July 1991 and pleaded guilty to the amended charge of assault causing severe injury, danger to life and permanent impairment, all with intent to rob (under deletion of the element of attempted murder). On 13 October 1991, nearly 15 months after the original injury, the victim died. The Crown decided to indict the appellant on a charge of culpable homicide. It accepted that having accepted a plea of guilty to the earlier indictment after

[37] (1971) 1 SA 646, 652 *per* Beadle CJ.

[38] GH Gordon, *The Criminal Law of Scotland* (2nd ed 1978) p 730.

[39] Hume, i.181; *Patrick Kinninmonth* (1697) Hume, i.181; Alison, i.150; Macdonald, 88; *Daniel Houston* (1833) Bell's Notes 70 (footnote in original).

[40] Report of the Select Committee on Murder and Life Imprisonment (1989) HL 78-III p 403: see para 3.11 above.

[41] *Ibid*, p 421: see para 3.12 above.

[42] *Christopher Tees* High Court of Justiciary Opinion of the Court delivered by the Lord Justice Clerk on 27 October 1993. Unreported.

deletion of the element of attempted murder, it could not now properly charge with the crime of murder.

22. At a preliminary diet, counsel contended that it was not competent for the Crown to take this course, and in the alternative that it would be oppressive to allow the Crown to proceed with the second charge. The judge rejected both these contentions. Mr Tees appealed.

23. The court first addressed the issue of competence. It held that a long line of early authority made it clear that if after a trial an event has occurred which changes the character of the offence (as, for example, where a trial for assault has taken place and the injured party dies), a plea of *res judicata* will not exclude an indictment for homicide. It follows that a person who has been convicted of **assault** may later be tried for murder or culpable homicide if the victim of the assault subsequently dies, on the assumption that the death of the victim was due to the initial assault. Death is a new element and creates a new crime. The course which the Crown had adopted was, therefore, a competent one for it to adopt. Secondly, the court addressed the more general issue of oppression. The appellant had contended that the victim had been unconscious since the date of assault and that there was never any prospect of his recovering consciousness. He might, however, have survived in this state for a much longer period. A person in his situation could never know when, if ever, he would be clear of the possibility of being charged with murder or culpable homicide. The court held that in circumstances such as these, it is not necessarily oppressive for the Crown to indict the assailant for a second time and to charge him with homicide after the victim has died. The court added that:

> "We would not, however, discount the possibility of a case of oppression being made out if the death of the victim occurred many years after the assault and the first trial of the accused on a charge of assault. If death occurred many years after the assault but could still be attributed to the assault, it might be regarded as oppressive for the Crown to seek to indict the accused for murder or culpable homicide. Each case must obviously depend upon its own facts."[43]

Other jurisdictions

24. The homicide provisions in almost all other European jurisdictions[44] contain no equivalent to the year and a day rule; for example, there is no provision to this effect in the Codes of France, Italy, Germany, Austria, Greece, Turkey or Poland.[45]

[43] Transcript p 12.

[44] The one exception appears to be Cyprus: see *Weekly Hansard* (1994) Issue No 1651, vol 241, col 87.

[45] See relevant volume of *American Series of Foreign Penal Codes*.

APPENDIX C

STATUTORY PROVISIONS IN AUSTRALIA ABOLISHING THE RULE

Crimes (Year and a Day Rule) Act 1991 (Victoria)

"3. After section 9 of the Crimes Act 1958 insert

'9 AA. Abolition of the year-and-a-day rule.

(1) The rule of law known as the year-and-a-day rule (under which an act or omission that in fact causes death is not regarded as the cause of death if the death occurs more than a year and a day after the act or omission) is abolished;

(2) This section does not apply to acts or omissions alleged to have occurred -

(a) before the commencement of the Crimes (Year and a Day Rule) Act 1991; or

(b) between the two dates, one before and one after that commencement.'"

Crimes (Injuries) Amendment Act 1990 (New South Wales)

"Schedule 1 - Amendment to Crimes Act 1900.

(2) Section 17A

Before section 18 insert:

'Date of death.

17A(1) The rule of law that it is conclusively presumed that an injury was not the cause of death of a person if the person died after the expiration of the period of a year and a day after the date on which the person received the injury is abrogated.

17A(2) This section does not apply in respect of any injury received before the commencement of this section.'"

Criminal Law Consolidation (Abolition of the Year-and-a-day Rule) Amendment Act 1991 (South Australia)

"2. The following section is inserted after section 17 of the [Criminal Law Consolidation Act 1935]:

'Abolition of year-and-a-day rule.

18. An act or omission that in fact causes death will be regarded in law as the cause of death even though the death occurs more than a year and a day after the act or omission'".

Criminal Law Amendment Act 1991 (Western Australia)

"Section 276 repealed.

6(1) Section 276 of the Code is repealed.[1]

...

[1] See n 12 to para 6 in Appendix B.

6(3) Notwithstanding subsection (1), section 276 of the Code continues to apply in relation to -

(a) any death that occurred before the commencement of this section; and

(b) any death that occurs after the commencement of this section if the relevant day was not less than a year and a day before the commencement of this section."

Criminal Code Amendment (Year and a Day Rule Repeal) Act 1993 (Tasmania)

"Section 155 repealed.

4. Section 155 of the Code is repealed.[2]

...

6(1) The repeal effected by section 4 of this Act does not apply to criminal proceedings that began before the commencement of this Act.

6(2) For the purposes of subsection (1), criminal proceedings are taken to have begun if the defendant has been called upon to plead."

[2] See n 13 to para 6 in Appendix B.

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